Central Law Journal.

ST. LOUIS, MO., APRIL 9, 1897.

The case of Allgeyer v. State of Louisiana, 17 S. C. Rep. 427, recently decided by the United States Supreme Court is a forcible and timely reminder that there are limitations upon the power of States in attempting to regulate foreign corporations. The court, reversing the Supreme Court of Louisiana, held that a State statute, which, as construed by the highest State court, prohibits a citizen of the State, under an open policy of marine insurance, effected outside of the State, in a foreign insurance company which has not complied with the State law, from sending by mail or telegraph, while in the State, a notice describing particular goods then within the State, upon which he desires the insurance under the open policy to attach, operates to deprive such citizen of his liberty without due process of law, in violation of the fourteenth amendment of the federal constitution. The legislation in question assumed to make any person so attempting to transact business with a foreign insurance company guilty of a misdemeanor, and its object obviously was to prevent what was considered to be a form of evasion of a State law requiring foreign insurance companies, in order to do business within the State, to comply with conditions prescribed by the State legislature. "Has not a citizen of a State" asks Mr. Justice Peckham who delivered the opinion of the court, "under the provisions of the federal constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which State legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the State statutes. Such acts come within the principle of the Hooper Case, 155 U. S. 648, and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State, under the circumstances of this case and for the purpose therein mentioned, we hold a proper act—one which the defendants were at liberty to perform, and which the State legislature had no right to prevent, at least with reference to the federal constitution. To deprive the citizen of such a right as herein prescribed without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the federal constitution." Mr. Justice Peckham also observed that in the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto; and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. Milliken v. Pratt, 125 Mass. 374; Tilson v. Blair, 21 Wall. 241.

The decision of the court thus forcibly asserting the right of the citizen to engage in any lawful business, without wanton interference or penalty, has met with very general approbation. The *New York Law Journal* says that "the significance of

this federal case is that, while power in a State to regulate the business of a foreign corporation admitted within its borders is reiterated, the disposition is shown to strictly uphold the fundamental rights of the individual from invasion through the pretext of corporate regulation. The decision is sound in principle and eminently proper and just. Its reasoning might have considerable collateral force, though not direct application, upon a kind of legislation which has been suggested in our own State with a view to the regulation of foreign corporations and their business. It has been proposed to impose upon directors and officers of foreign corporations doing business in this State personal liabilities and penalties similar to those attaching to the corresponding officers of domestic corporations. Whether such legislation could legitimately be comprehended under the regulation of foreign corporations, or whether it would not rather constitute unjustifiable subjection of individuals to oppression and penalty, are at least serious questions."

NOTES OF RECENT DECISIONS.

ACCIDENT INSURANCE — "BODILY INFIRMITIES"—APOPLEXY.—In Travelers' Ins. Co. v. Selden, 78 Fed. Rep. 285, decided by the United States Circuit Court of Appeals for the Fourth Circuit, it appeared that the T. Ins. Co. issued an accident policy to one S, insuring him against death resulting through external, violent and accidental means, but not covering death resulting wholly or partly, directly or indirectly, from disease or bodily infirmity, or voluntary overexertion. S, a man 53 years of age, while engaged in work which required stooping, and shortly after running rapidly up a hillside, to get an article needed in his work, was attacked with pains in his head and shortly after died. On the trial of an action on the policy, two physicians, called by the plaintiff, testified that S died of apoplexy, which is a bodily infirmity or disease, and that there was nothing in the circumstances to have caused death if there had been no bodily infirmity or predisposition to apoplexy. It was held that it was error to refuse to direct a verdict for the defendant. "The case under consideration" said the court "was simply one of contract. Had the policy of insurance been an ordinary life policy, the right to recovery is plain; but it is the duty of courts to enforce contracts as made, and not to make or allow to be made new contracts between the parties. The contract was what is known as, and what on its face and in its terms it purported to be, an 'accident policy,' and the defendant corporation covenanted to pay the sum of money named if death resulted from bodily injuries through 'external, violent, and accidental means alone, independently of all other causes,' and it was expressly stipulated that it should 'not cover injuries of which there is no visible mark, nor death resulting wholly or partly, directly or indirectly, from disease or bodily infirmity,' or from 'voluntary overexertion.' In an etymological sense, anything that happens may be said to be an 'accident,' but in the sense in which the word is used in this policy, as shown by the context and as expounded in similar cases, it is to be taken as meaning 'an event which proceeds from an unknown cause, or as an unusual effect of a known cause, and therefore unexpected'—something casual and fortuitous. To entitle the plaintiff below to recover, the burden of proof was upon her, not only to show that the deceased came to his death through 'external, violent and accidental means alone,' but also to show that the death was not due, in whole or in part, directly or indirectly, to disease or bodily infirmity. There was not only no proof of any accident, but conclusive evidence, from the only medical witnesses examined, that death was due to disease. If, during the operation upon the colt, while running to the fire for the hot iron, the deceased had stumbled or fell, that might have been considered an accident; but there was nothing of the kind. At most, it might be contended that the exertions and activities of that morning tended to bring into activity a then existing but dormant disorder; but 'voluntary overexertion,' and disease and bodily infirmity, are in express words not insured against."

ACTIONS AGAINST FOREIGN EXECUTORS.—The general rule of law is that an executor can only sue or be sued in his own forum. But in Pennsylvania the rule cannot be stated so broadly as appears from the case of Laughlin v. Solomon, 36 Atl. Rep. 704, recently decided by the Supreme Court of Penn-

sylvania, in which it is held that a foreign executor residing in Pennsylvania may be sued therein by a resident creditor of decedent. The court reviews the Pennsylvania cases only.

MUNICIPAL CORPORATIONS — ICE AND SNOW ON SIDEWALK — LIABILITY.—In Huston v. City of Council Bluffs, 69 N. W. Rep. 1130, decided by the Supreme Court of Iowa, it was held that where snow, accumulated on a walk from natural causes, becomes uneven by travel, or where a walk is so constructed as to dam up melted snow flowing from adjoining land, and it freezes into ridges, a person injured thereon, while using ordinary care, may recover from the city, if it permitted such condition to exist for an unreasonable time after the same became known to the authorities, or might have been known by reasonable care. It was also held that in an action against a city for injuries received in falling on an icy sidewalk, the official record of the United States weather bureau, taken at a town four miles from the place of injury, is admissible to show the temperature and snowfall during the month when the accident occurred. On the first point the court said:

Evidence was adduced tending to support the allegations of this petition, and the court below gave the following instructions with reference thereto: "Now, it may be stated as a general rule that the mere fact that snow or sleet has fallen upon the sidewalk from the clouds, and thereby rendered the sidewalk slippery and difficult to pass over, would not make the city liable therefor, even though such ice and snow should remain upon the walk for an unreasonable length of time after the officers of the city, whose duties require them to look after such matters, had notice of its existence, or after they, in the exercise of reasonable care in performing their duties, ought to have known of its existence; but this rule relates only to the natural conditions resulting from rain or sleet falling and freezing upon the walk, or snow accumulating upon the walk from natural causes. Where, after such ice or snow has thus accumulated, if by reason of persons traveling over same, or if, from other causes, as from ice or snow thawing and flowing down upon the walk from other lands, the surface of the snow or ice upon the walk becomes rough, or ridged, or rounded in form, or lies at an angle, or slanting, to the plane surface of the walk, so that it becomes difficult and dangerous for persons traveling on foot to pass over same when exercising ordinary care, or if the walk is constructed in such manner as not to permit the natural flow of the water and thawing snow from lands adjoining, but dams same upon the walk, and holds same there until it freezes, and the walk becomes dangerous, by reason thereof, to persons using ordinary care in attempting to pass over same, or, by reason of snow or ice having accumulated on the walk from natural causes, the flowing water and snow from adjoining lands are dammed up and held upon the walk, and frozen there, and by reason thereof make the walk dangerous for persons using ordinary care in passing over the same on foot, then the city becomes liable for injuries caused by such obstruction, provided the person injured did not contribute to his injury by negligence on his part, and the obstruction has existed for an unreasonable length of time after the same became known to the city authorities, or ought to have been known to them in the exercise of reasonable care." Other instructions, embodying the same thought, but applying it more specifically to the facts of the case, were given by the court in his charge. And of all these the defendant complains.

It is contended that the case falls within the rule announced in the case of Broburg v. City of Des Moines, 63 Iowa, 523, 19 N. W. Rep. 340. In that case we said: "The mere fact that a street is in a dangerous condition because of ice and snow, rendering the walks slippery by reason of the operation of natural causes, should not render the city liable, even if such ice and snow are not removed in a reasonable time. But when it becomes, by reason of the travel thereon or other causes, rounded or in ridges, then it may be that the city should be required to remove such ice and snow." In the same case we cited the rule for such cases from the opinion in Cook v. City of Milwaukee, 24 Wis. 274, as follows: "When ice or snow is suffered to remain upon a sidewalk in such an uneven and rounded form that a person cannot walk over it, using due care, without danger of falling down, that it seems to constitute a defect for which the city or town is liable." It seems to us that the instructions given by the lower court are in strict accord with the rules announced in the cited cases. In that case the snow and ice complained of was in the same condition as nature placed it. The case of Collins v. City of Council Bluffs, 32 Iowa, 324, is quite like the one at bar. There, as here, the snow had not been removed from the pavement. "It was to some extent thawed during the daytime, and, as there was a great amount of travel along the sidewalk, . . . the pavement became covered with ice, uneven and irregular upon its surface, thus rendering the locality difficult and unsafe for foot passengers." There, as here, plaintiff had no knowledge of the obstruction, and the jury was justified in finding that he was exercising proper care and diligence when the accident happened. With this state of facts in mind, we said: "The negligent permission of an obstruction in a street from snow and ice being deposited there from natural causes, whereby injury results to a traveler, will render the city liable." These cases are in line with the almost universal voice of authority. See Adams v. Inhabitants of Chicopee, 147 Mass. 440, 18 N. E. Rep. 231; Fitzgerald v. Inhabitants of Woburn, 109 Mass. 204; City of Boulder v. Niles (Colo. Sup.), 12 Pac. Rep. 632; Dill. Mun. Corp. (4th Ed.) sec. 1006; Elliott, Roads & S., pp. 458 460; Todd v. City of Troy, 61 N. Y. 506, and note in annotated edition by Irving Browne; Hill v. City of Fond du Lac, 56 Wis. 242, 14 N. W. Rep. 25; Stanton v. City of Springfield, 12 Allen, 566.

LIFE INSURANCE — INSURABLE INTEREST — INTENDED WIFE. — The Court of Civil Appeals of Texas decides in Taylor v. Travelers' Ins. Co., 39 S. W. Rep. 185, that a woman has an insurable interest in the life of her intended husband. The court says in part:

The main question of law, presented in various forms by the assignments of error, is: Did the engagement of the appellee to marry Allen Taylor give her an insurable interest in his life, and entitle her to recover upon a policy issued on it, payable to herself? Before entering upon the consideration of this question, we will say that, outside of this State, the right of a man to insure his own life, and make the policy payable to whomsoever he chooses, irrespective of the question of insurable interest, seems never to have been doubted. Insurance Co. v. Schaefer, 94 U. S. 457; Insurance Co. v. France, *Id.* 561; Goodrich v. Treat, 3 Colo. 408; Lemon v. Insurance Co., 38 Conn. 294; Fairchild v. Association, 51 Vt. 613; Assurance Co. v. Craigen, 6 Russ. & G. 440; Association v. Houghton, 103 Ind. 286, 2 N. E. Rep. 763; Association v. Blue, 120 Ill. 121, 11 N. E. Rep. 331; Heinlein v. Insurance Co. (Mich.), 59 N. W. Rep. 615; Insurance Co. v. Barr, 16 C. C. A. 51, 68 Fed. Rep. 873. This, however, appears to be an open question in Texas. Mayher v. Insurance Co., 87 Tex. 168, 27 S. W. Rep. 124; Heinlein v. Insurance Co. (Mich.), 25 Lawy. Rep. Ann. 630, note, 59 N. W. Rep. 615. Under our view of this case, it is unnecessary for us to express any opinion on this question, and we have only referred to it for the purpose of saying that, by basing our opinion upon the ground of an insurable interest of the appellee in the life of the deceased, we do not which to be understood as repudiating a principle elsewhere so well established. Whenever there is such a relationship that the insurer has a legal claim on the insured for services or support, or when, from the personal relation between them, the former has a reasonable right to expect some pecuniary advantage from the continuance of the life of the other, or to fear loss from his death, an insurable interest exists. May, Ins. (3d Ed.) § 102*a*. That a woman has a reasonable right to expect some pecuniary advantage from the continuance of the life of him to whom she is engaged to be married is beyond question. The consummation of the contract of marriage is, of all contracts, by woman most devoutly to be wished. Social position, wealth, happiness, though frequently never realized, are its anticipated concomitants. Its breach by her fiancee gives her an action against him, entitling her to recover pecuniary compensation for the advantages she has lost from its non-performance. When it is terminated by his death, she is entitled to recover on an insurance policy that her intended husband has providently taken in her favor on his life, to indemnify her for the loss she has thereby sustained. Chisholm v. Insurance Co., 52 Mo. 213; May, Ins. § 107*a*; Richards Ins. § 27.

NEGLIGENCE—INJURY TO MINOR.—In Holbrook v. Aldrich, decided by the Supreme Judicial Court of Massachusetts it was held that where a child seven years old entered a shop with her father, and, while he was paying for goods bought, passed her hand in a coffee grinder and was injured, the owner of the store was not liable. The court says:

This is an action for loss of the plaintiff's fingers, which were cut off by a coffee grinder in the defendants' shop. The plaintiff, a minor less than seven years old, entered the shop with her father, who was going to make a purchase. She intended to buy some candy, but in the first place accompanied her father to a part of the shop at some distance from the candy counter, and near to the coffee grinder. He let go her hand to get his money. She went over to the coffee grinder, put her hand up the spout out of which the ground coffee came, hoping to get some whole kernels, and lost her fingers. The judge directed a verdict for the defendants, and the plaintiff excepted.

We are of the opinion that the direction was right. If the decision were to be put on the narrowest possible ground it might be said that at the moment of the accident the plaintiff was not within the scope of the defendants' implied invitation, and therefore was entitled to no protection against such possibilities of harm to herself. But, even if she had been buying coffee, we should regard the rule as the same. The defendants' invitation in that case would have bound them to due care for the safety of those walking in the neighborhood while simply moving about. But it would not have bound them to look out for or to prevent wrongful acts, on the ground that the acts, if done, might hurt the actor. Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen. McEachern v. Railroad Co., 150 Mass. 515, 23 N. E. Rep. 231; Daniels v. Railroad Co., 154 Mass. 349, 28 N. E. Rep. 283; Gay v. Railway Co., 150 Mass. 238, 34 N. E. Rep. 186. The case is similar in principle to McGuiness v. Butler, 159 Mass. 233, 34 N. E. Rep. 259, and to Mangan v. Atterton, L. R. 1 Exch. 239, which, notwithstanding the observations in Clark v. Chambers, 3 Q. B. Div. 327, has been cited in this commonwealth repeatedly as unquestioned law. See, also, Hughes v. Macfie, 2 Hurl & C. 744. In Moynihan v. Whidden, 143 Mass. 287, 9 N. E. Rep. 645, which would have to yield to McGuiness v. Butler if there were a conflict, it seems to have been assumed that the plaintiff's touching the rope was not tortious.

CRIMINAL PRACTICE — INDICTMENT — OBSCENITY.—The Supreme Court of New York holds in People v. Kaufman, 43 N. Y. Supp. 1046, that an indictment for selling an obscene book need not set out the obscene matter, nor describe the same in general terms, if it sufficiently identifies the book and states that the contents are too indecent to be placed on the record. To the same effect is the decision of the Supreme Court of the United States in Rosen v. United States (Jan., 1896, 16 Sup. Ct. Rep. 424). The following language from the opinion in the New York case, by Judge Barrett, forcibly states the argument in favor of the rule laid down:

The current of authority in this country favors an exception to the general rule of pleading in this class of offenses. It may now fairly be said to be the settled American rule that it is not necessary to set out matter in an indictment which the grand jury asserts to be too obscene for recital. It is only necessary to identify the obscene book or publication sufficiently to apprise the defendant of what particular book or publication is intended, and to aver its obscenity,

giving as an excuse for not setting forth the obscene matter that it is so gross as to be offensive to the court, and improper to be placed upon its records. 1 Bish. New Cr. Proc., secs. 496, 561; Whart. Cr. Law, secs. 311, 2547; Com. v. Holmes, 17 Mass. 336; Com. v. Sharpless, 2 Serg. & R. 91; People v. Girardin, Man. 90; State v. Brown, 27 Vt. 619; McNair v. People, 89 Ill. 441; U. S. v. Clarke, 40 Fed. Rep. 325; State v. Smith, 17 R. I. 371, 22 Atl. Rep. 282. A rigid adherence, in such cases, to the ordinary rule that it must appear upon the face of the indictment that the printed matter was of the character charged, would, as was said in Com. v. Holmes, *supra*, "require that the public itself should give permanency and notoriety to indecency in order to punish it." Courts will not allow their records to be polluted by obscene matter. "To do this," observed the court in People v. Girardin, *supra*, "would be to require a court of justice to perpetuate and give notoriety to an indecent publication before its author could be visited for the great wrong he may have done to the public or to individuals." By the American doctrine and practice on this head, as Mr. Bishop points out, the avoiding of obscene allegation in the record, breeding corruption, is a necessity, excusing the setting out of the words. It is claimed, however, that the obscene matter should have been described, at least in general terms. The answer to this is that, if the matter is too obscene to be set out, it is also too obscene to be properly described. An accurate description of obscene matter, however general, would itself be obscene. Nothing would be gained by condensation. How, indeed, can obscenity be condensed so as to be descriptive, and yet sufficiently decent to be placed upon record? We refer now to such a description as would enable the court, upon the face of the indictment to determine whether the book or publication is, in fact, obscene. Any merely general description would not be a description at all; that is, of the obscene words or matter. A mere description, for instance, of the subject-matter—of what, in general, the book is about—would not be a description of the actual obscenity charged. It would not apprise the defendant of the particular facts upon which the charge is based. It would simply be a means of identifying the book or publication, and that is as well, if not better, effected by stating its title. In none of the cases which have been referred to, with the possible exception of Com. v. Sharpless, did the indictment contain a description, either minute or general, of the nature of the obscenity, and in none of them was a descriptive statement of the obscene matter required.

The rule to which we have referred is not in conflict with that laid down in People v. Hallenbeck, 52 How. Prac. 502, and People v. Danihy, 63 Hun, 579, 18 N. Y. Supp. 467. In neither of these cases was the omission of the obscene matter excused by the statement, in the indictment itself, that it was too gross to be placed upon record. We agree that, where this excuse is not made by the grand jury upon the face of the indictment, the obscene matter must be set out. Where, however, that excuse is thus made, we think the general rule should be modified in the interest of public decency; and the defendant must then be satisfied with such descriptive allegations as clearly identify the book or publication intended, together with the statement that the obscene matter which the grand jury deem too foul to be spread upon the record is contained therein. If anything more is requisite for the protection of the defendant's rights, it may well be left to the discretion of the court to compel the public prosecutor to furnish such further information or specification as may be needful.

RESPONSIBILITY OF INSURANCE COMPANY FOR MIS-STATEMENT OF ITS AGENT AS TO HEALTH OF THE INSURED.

Let us suppose the most common case of application for an insurance policy, that of one who has yielded to the importunities of a persistent agent and consented to take out a policy of insurance on his life. The agent, or perhaps, the insurance company's medical examiner, acts as amanuensis in writing answers to the numerous printed questions propounded in every policy as to the past and present health of the applicant. The applicant gives truthful and full answers to these questions, but the agent, accidentally or wilfully, writes down an incorrect answer to a question materially affecting the risk, or negligently omits to write an important part of the answer to such question. The agent reads over the answers to the applicant, who signs a certificate at the foot of the report, the declaration or warranty of the insured that he has given true answers to the questions and that they agree exactly with the foregoing, or the form may be that the answers written in the doctor's certificate are true, and, according to the answers, bind him. In the policy there is a provision that no agent has authority to waive any of its conditions and a limitation of the company's responsibility for the acts of agents to simple receipt and delivery of the policy, and a declaration that for all other purposes, he is the agent of the insured. By the terms of the policy, it is to become void if any of the representations made prove untrue. Can the insurance company on discovering that material representations in the policy are untrue, or that material facts have been omitted, repudiate the act of its agent, cancel the policy and forfeit premiums paid it by the insured, and successfully defend an action by the insured for recovery of his premiums, on the grounds of breach of warranty and misrepresentation? The answer to this question depends on the *status* of the agent. A few of the earlier decisions in Massachusetts, Pennsylvania, North Carolina and Alabama hold him to be the agent of the insured,[1] but the tendency of modern decisions in this country is steadily in the opposite direction and the weight of authority holds him to be

[1] 11 Am. & Eng. Ency. Law, 327, and cases cited.

the agent of the insurance company only and the knowledge of the agent in this case is regarded as the knowledge of the company.[2] The powers of the agent are, *prima facie*, co-extensive with the business intrusted to his care and will not be narrowed by limitations not communicated to the person with whom he deals.[3] The responsibility of the agent cannot be limited to the simple receipt and delivery of the policy by any proviso in the policy which so limits his authority and declares that for all other purposes, he is the agent of the assured.[4] "There is no magic power residing in the words of that stipulation to transmute the real into the unreal. A device of mere words cannot in a case like this be imposed upon the view of a court of justice in the place of an actuality of fact and make the company and its agents the agents of the insured, their doings, the doings of the insured."[5] Mistakes and omissions of the agent in preparing the description, or otherwise, are treated as those of the company.[6] Notice to the general agent is notice to the company, and this comprehends knowledge acquired of facts after the execution of the policy, which, unless waived, would avoid it, as well as all inaccuracies of statements by applicants and of the existence of other facts prior to the execution of the policy, the omission to state which would otherwise vitiate it.[7]

Medical Examiner Agent of Company Only.—The company's doctor is as fully the agent of the insurance company as is the general agent when he reports the answers of the applicant.[8] In some States, he would, in the case of a company not incorporated in the State, come under the statutory definition of an insurance agent, as in Illinois, where the term agent includes "an acknowledged agent, surveyor, broker or any other person or persons who shall, in any manner, aid in transacting the insurance business of the company,"[9] and the word "acknowledged" has been held by the supreme court to have no qualifying effect.[10] When either the medical examiner or the general agent takes upon himself the task of writing down the applicant's answers, a task he might well have required the applicant himself to perform, he also takes upon himself the duty of transcribing his answers correctly. If he intentionally neglects to do so, he is guilty of fraud, which arises from the suppression or concealment of facts known, as well as from actual misrepresentation.[11]

Admission of Parol Evidence. — The contract not expressing the real intention of the parties through the fraud, accident or mistake of the agent of the defendant company, parol evidence is admissible on behalf of the plaintiff, in reply to the defendant company's charge of misrepresentation, not with a view to varying, contradicting or modifying the terms of the written policy but to show the actual transaction, *i. e.*, what the applicant really stated to the agent and that the agent filled out the application with full knowledge of all the facts, and that, in a court of law[12] and without reforming the contract or asking for equitable relief.[13] The insured, having paid his money, having acted in all things in good faith, fully disclosing to the company through its agent the necessary facts, or they being otherwise cognizant of them, and dispensing with any act on his part, and the insurer by his incompetent or reckless agent, having prepared the application or survey so as not to speak the truth, or so as to omit important information, the company cannot be heard to urge the courts to make refined and almost impalpable distinctions to release them from their obligations and permit them to hold the premiums the assured believed and was encouraged and

[2] Ins. Co. v. Wilkinson, 13 Wall. 222, leading case; Ins. Co. v. Mahone, 21 Wall. 152; Andes Ins. Co. v. Fish, 71 Ill. 620, *loc. cit.*; N. E. F. & M. I. Co. v. Schettler, 38 Ill. 171, citing C. B. & Q. Ry. v. Coleman, 18 Ill. 299; German F. I. Co. v. Carrow, 21 I. A. 627.

[3] 13 Wall. 222; Merchants' Bank v. State Bank, 10 Wall. 644; Ins. Co. v. Kelly, 24 Ohio St. 345; Farmers' & Merchants' Ins. Co. v. Chestnut, 50 Ill. 118; Ætna Life Ins. Co. v. Maguire, 51 Ill. 342; Cont. Ins. Co. v. Ruckman, 127 Ill. 387.

[4] 13 Wall. 222, citing 25 Conn. 51, 8 Wright 259, 16 Wis. 241, 17 Iowa, 276; Lycoming, F. I. Co. v. Ward, 90 Ill. 545.

[5] Com'l Ins. Co. v. Ives, 56 Ill. 402.

[6] 11 Am. & Eng. Ency. Law, 331, citing 4 Bosw. (N. Y.) 298, 23 Pa. St. 50, 109 Pa. St. 507, 33 Ohio St. 555, 21 Iowa, 185, 21 Mich. 246, 52 Me. 322.

[7] 11 Am. & Eng. Ency. Law, tit. Insurance, 328, citing many cases.

[8] Grattan, Exec. v. Met. L. I. Co., 80 N. Y. 281; Grattan, Adm'x v. Met. L. I. Co., 92 N. Y. 274; Bentz v. N. W. Aid Assn., 41 N. W. Rep. 1037, and cases cited

[9] R. S. Ill. Hurd, 1891, ch. 73, Ins. § 22 and § 124.

[10] Cont. Ins. Co. v. Ruckman, 127 Ill. 387.

[11] Anson on Contracts, 146; Peek v. Gurney, L. R. 6 H. L. 403.

[12] Ins. Co. v. Wilkinson, 13 Wall. 222, 71 Ill. 620.

[13] 80 N. Y. 281.

induced by the company to believe would protect him from loss.

Application of Estoppel in Pais.—To apply to such cases, courts of law in modern times have introduced the doctrine of equitable estoppel, or estoppel *in pais*. The insurance contract having been signed by the insured only and prepared by persons acting in the exclusive interest of the insurance company, the language used is held to be that of the insurer.[14] The misrepresentations having been made by the agent of the company with full knowledge of the actual facts, and the company having thus induced the plaintiff to give them an advantage that it would be inequitable and against good conscience for them to assert, is estopped by its own conduct from asserting the advantage it has thus gained over the plaintiff. If the company has suffered in the transaction, it is from its own agent and not the assured, that it must seek redress.[15] Some of the leading cases do not consider it negligence on the part of the assured to rely upon the integrity and honesty of the agent in writing down his answers,[16] and it has been held not to be fraud and deception on the part of the plaintiff to state in the certificate that he has read the answers and that they were true. He can still show that he did not read them.[17] In Insurance Co. v. Mahone,[18] the agent of the company wrote the answers and afterwards read them to the assured, one Dillard. In an action of debt brought by Mahone and wife on the policy issued to Dillard, the company defended on the ground of false and fraudulent representations made by D as to his temperance. The written answer to the query, "Is party temperate and regular in his habits," was "Yes." He also answered "Yes" to the question, "Is applicant aware that any untrue or fraudulent answer * * * or any suppression of facts in regard to his health, habits or circumstances, will vitiate the policy?" A proviso in the policy declared it should be void if he became so far intemperate as to impair his health. The court said it made no difference that the answers as written by the agent were read to D. The agent having undertaken to prepare and forward the proposals, D had a right to assume that the answers he did make were accepted as meaning, for the purpose of obtaining a policy, what Yeiser, the agent, stated them in writing to be, that the acts and declarations of the agent were those of the company, and permitted the introduction of oral testimony that D had replied to the first question, "I never refuse to take a drink" or "I always take my drinks." To this (the court held) the company replied, in effect, "We understand your answer to mean the same, in your application for a policy as if you had answered 'Yes,' and we accept it as such and write 'Yes' in the proposals." Then upon being asked if he warranted the truth of his answers, he returned the reply, "Since you so understand my answers, I do." The modern decisions on this subject seem to be founded on principles of sound common sense. As was ably said by Mr. Justice Breese of the Illinois Supreme Court: "Unless corporations are bound by the acts and admissions of their officers and agents acting in the ordinary affairs of the corporation, so far as relates to the business usually transacted by such officers and agents, they would enjoy an immunity incompatible with the rights of individuals and destructive of the object of their creation."[19] The modern decisions follow and adapt themselves to the evolution of the insurance business, an evolution taken note of in the leading case of Insurance Co. v. Wilkinson,[20] where a distinction is made between the case in question, which represents the practice of modern times, with its sharp competition between rival insurance companies, the continual solicitation of business through agents and the stimulation of agents to keen activity by letters, circulars and liberal pecuniary inducements, and a case under the old method of doing business where companies waited for parties to seek insurance, where the as-

[14] Niagara F. I. Co. v. Scammon, 100 Ill. 644.

[15] 13 Wall. 222, 21 Wall. 152, 71 Ill. 620, 21 I. A. 627; Ill. Mut. Ins. Co. v. Malley, 50 Ill. 421, 38 Ill. 171; Cont. Ins. Co. v. Ives, 56 Ill. 402; H. & M. Ins. Co. v. Cornick, 24 Ill. 461; Peoria F. & M. Ins. Co. v. Harvey, 34 Ill. 46; Broom's Legal Maxims, 281; Combs v Hannibal Savings & Ins. Co., 43 Mo. 148; Woodbury Sav. Bank v. Charter Oak. Ins. Co., 31 Conn. 526; Rowley v. Empire Ins. Co., 36 N. Y. 550; Plumb v. Cattaraugus Ins. Co., 18 N. Y. 392.

[16] Ins. Co. v. Mahone, 21 Wall. 152, 13 Wall. 222, 71 Ill. 620.

[17] 92 N. Y. 274; 71 Ill. 620; Ætna Life Ins. Co. v. Paul, 10 Bradw. (Ill. App. Ct. Rep.) 431.

[18] 21 Wall. (U. S. Sup. Ct.) 152.

[19] N. E. F. & M. Ins. Co. v. Schettler, 38 Ill. 171.

[20] 13 Wall. (U. S. Sup. Ct.) 222.

sured made his own application and wrote his own answers to questions, in which case, he would be held entirely responsible for his statements.[21] But in the first case, the court took cognizance also of the fact that the party who has been induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to, and relies upon, the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said and done in making the contract, and said the court, "Has he not a right so to regard him?"

FLORA V. WOODWARD TIBBITS.

[21] 22 Ill. 473; Atlantic Ins. Co. v. Wright, 71 Ill. 620.

PLEADINGS—ACTION—SPLITTING OF CLAIM—BAR.

REYNOLDS v. JONES.

Supreme Court of Arkansas, December 5, 1896.

1. An action for use and occupation of land is a single cause of action, and plaintiff cannot so split the claim as to maintain two actions.

2. A compromise of one suit thereon bars a subsequent action.

BUNN, C. J. (after stating the facts): The principal question in the case is one of pleading; that is to say, whether or not appellee had a right to split up her claims for back rents, or for use and occupation, or for damages for the retention of the possession of her lands. It is a well-established rule of law that a single cause of action cannot be split in order that separate suits may be brought for the various parts of what really constitutes but one demand. It is said by the court in Dutton v. Shaw, 35 Mich. 431, that "the principle which prevents the splitting up of causes of action and forbids double vexation for the same thing is a rule of justice, and not to be classed among technicalities." In Damon v. Denny, 54 Conn. 253, 7 Atl. Rep. 409, the court said: "Where in a pending suit it is legally possible for a judgment to be rendered upon a cause of action alleged in the second suit, and the first was brought for the purpose of obtaining such a judgment, the plaintiff is bound to exhaust the possibilities of that suit before subjecting the defendant to the cost of a second suit." See, also, Hitchin v. Campbell, 2 W. Bl. 827; Martin v. Kennedy, 2 Bos. & P. 71; Seddon v. Tutop, 6 Term R. 607; Thorpe v. Cooper, 5 Bing. 116. The justice of the rule is, however, questioned by some courts and jurists, perhaps more, however, in its too extensive application, than on account of any injustice in it when applied under proper restrictions. Thus Brett, J., in Brunsden v. Humphrey, 14 Q. B. Div. 145, said: "When that rule is applied to damages which are patent, it is a good rule; but, where damages are afterwards developed, it is not a rule to be commended. It is a rule which sometimes produces a harsh result, and, if it were now for the first time put forward, I could not consent to its being pushed to the length to which it has been sometimes carried." In Stickel v. Steel, 41 Mich. 350, 1 N. W. Rep. 1046, the principle is advanced that claims originally one and indivisible may become single and separate, and in turn may again return to their indivisible estate. Cooley, J., uses this language: "In short, if the two bills constituted one demand in their origin, they must have become two for all legal purposes when the one fell due before the other; and, if united again by the other falling due, they would be again separated when the remedy on one was barred, or whenever anything occurred which should render one the subject of a suit when the other was not."

So much for the rule. It pertains in all the States of the Union and in England. The difficult thing is to apply the rule properly; that is, just what makes a single contract, giving only the one right of action, which cannot be split, is often a difficult question, and it is said that the cases are not altogether harmonious. "The bare fact that the two causes of action spring out of the same contract does not *ipso facto* render a judgment on one a bar to a suit on the other." Perry v. Dickerson, 85 N. Y. 345. "When several claims, payable at different times, arise out of the same contract or transaction, separate actions can be brought as each liability accrues." Reformed Church v. Brown, 54 Barb. 191; Sterner v. Gower, 3 Watts & S. 136; Transportation Co. v. Traube, 59 Mo. 355; Ryall v. Prince, 82 Ala. 264, 2 South. Rep. 319. "Yet, if no action is brought until more than one is due, all that are due must be included in one action; and, if an action is brought when more than one is due, a recovery in that suit will be an effectual bar to a second action, brought to recover the other claims that were due when the first was brought." Reformed Church v. Brown, *supra;* Transportation Co. v. Traube, *supra;* Nickerson v. Rockwell, 90 Ill. 460. Installments of rent are subject to the same rule as are other installments of money due. An action may be brought as each installment falls due, but all installments due are but one cause of action. 1 Enc. Pl. & Prac. p. 155, and the cases there cited. These authorities seem to settle the question. It seems to us that a suit for damages for wrongfully withholding or for use and occupation is even more a single cause of action, if anything, than a contract rental to be paid in installments.

We are met at this stage of the discussion with the proposition that the doctrine of *res judicata* governs this case, rather than the rule of pleading which we have been discussing, and that the defendant guardian,

is, in effect, sued first in his individual capacity, and then in this form of action as guardian; so that there are really two different defendants in the two actions. Having established this as a point of attack, it is next contended that the doctrine of *res judicata* does not apply, because the parties are not identical in the two suits. The authorities to which we have been referred to sustain this view are McBurnie v. Seaton, 111 Ind. 56, 12 N. E. Rep. 101; 2 Black, Judgm. 536; Hall v. Richardson, 22 Hun, 444; Rathbone v. Hooney, 58 N. Y. 463. It will be seen that in the case of McBurnie v. Seaton, McBurnie being dead, his wife, to whom had been allotted the notes and mortgages involved, instituted the second suit, and the other unsuccessful suit by McBurnie in his life-time on the same notes and mortgages as guardian was set up, and *res judicata* pleaded. The notes and mortgages were the property of McBurnie individually, and not as guardian, and for this reason his suit as guardian failed, and, as a matter of course, his wife was not estopped to sue on the notes, of which she was the legal owner. The statement in 2 Black on Judgments is based on this case of McBurnie v. Seaton. In Hall v. Richardson, 22 Hun, 444, the first action had been brought against Richardson as executor of Sutton Hall, deceased, and was unsuccessful, because he was not liable as such. The second action, involving perhaps something of the same subject, was brought against him individually. The second suit was not barred by the first. The case reported in 58 N. Y. 463 (Rathbone v. Hooney) was determined on a similar state of facts. It will readily be seen that, even if we were determining the case at bar on the principles governing the subject of *res judicata*, these cases are inapplicable. In the case at bar the appellant, if liable at all, was liable throughout individually in the ejectment suit. Were it possible in any case for an action to be maintained against one either individually or in his fiduciary capacity, it is not certain that *res judicata* could not be well pleaded in the second suit. The several items allowed by the court below or named in the commissioner's report as credits to appellant, consisting of value of improvements, repairs, and taxes paid, were involved in and settled by the ejectment suit; and the items of board, clothing, medicine, and tuition bills were evidently an afterthought, manifestly never intended to be made a matter of charge against the ward by the guardian, and therefore will be disallowed here. This settles the controversy between counsel as to the real meaning of the compromise judgment in ejectment on principles of law, and we are relieved of the duty of attempting to do so on the facts of the controversy. Reversed and remanded, with directions to enter judgment according to this opinion; appellee paying the cost of this appeal.

NOTE.—*Splitting Causes of Action.*—The principal case announces the correct rule in holding that a single and entire contract or cause of action cannot be so split up as to make two or more cases. It is contrary to the policy of the law to permit a defendant to be unnecessarily harassed by numerous suits upon one cause of action. For, if a single contract may be divided into two or more actions and suits sustained accordingly, where is the limit to be found? If two suits may be maintained when the same relief might be had by one, why not three, four or any number indefinitely? The vexation that would be thus caused might become intolerable. Nor is the vexation, alone, the sole basis upon which the rule is grounded. It is neither right nor just to oppress, under the guise of maintaining a lawsuit, a defendant with numerous and unnecessary cost bills when it is not really necessary to incur cost in more than a single action. The right to maintain two or more suits must carry with it the right to recover costs agianst the adverse party in each and every case, for the item of cost is an incident to, and follows the judgment. Again, the rule of law in such cases is akin to the familiar equitable doctrine that a multiplicity of suits is always to be avoided and, whenever it is possible to adjudicate the whole controversy in one action, this should be invariably done. It is sometimes attempted, by very bad pleading, to divide up a cause of action into two or more parts in order that it may be maintained in parts in a court which would not have jurisdiction of the same in the aggregate; but the law never tolerates such a proceeding. French v. Landis, 12 Rob. (La.) 633; State v. Newman, (La.), 20 South. Rep. 189; Bowell v. Kinsey, 3 Lev. 179; Smith v. Jones, 15 Johns. 228; Farrington v. Payne, 15 Johns. 432; Stephenson v. Lockwood, 13 Wend. 644; Moore v. Woodruff, 5 Ark. 214; Meek v. Parker (Ark.), 38 S. W. Rep. 900; Carberry v. German Insurance Co., 86 Wis. 323, 56 N. W. Rep. 920; Thatch v. Ins. Co., 11 Fed. Rep. 29; Hartford Insurance Co. v. Davenport, 37 Mich. 613; 34 Am. Law Reg. & Rev. 510, 516. In fact, it makes no difference what the object of the pleader be, or whether he have any special object in splitting his actions, the law will not permit it. Authorities *supra*. And where a single cause of action is split up and two or more suits brought thereon in order to get the demands within the jurisdiction of a justice of the peace, or for any other purpose, and the justice renders judgment in all the cases, all the judgments so rendered will be reversed because the criterion of jurisdiction is the whole amount involved in the single action. Such action "is a usurpation of jurisdiction and a justice might, if this be tolerable, take cognizance of contracts to any amount." Willard v. Sperry, 16 Johns. 121. And while the rule applies where it is attempted to evade or defeat the jurisdiction of the court having authority to try the cause exclusively of some other court, neither can separate entire demands be sued on in one action in order to raise the jurisdictional amount so as to defeat the jurisdiction of the court having cognizance of the separate demands or confer jurisdiction on the tribunal having jurisdiction only of causes wherein the amount in controversy is sustained by the aggregate amounts alone. Berry v. Linton, 1 Ark. 252; State v. Scoggin, 10 Ark. 326; Maxwell, Code Pleading (1892), p. 96. Where a demand is entire and indivisible, and suit is brought on a part of it only, the judgment rendered in such a case will preclude the party from afterwards realizing on the part of the claim not sued on. There is nothing to prevent a person from suing on part of his claim (Hunton v. Luce, 60 Ark. 146, 29 S. W. Rep. 151), but when he does so, he forever forfeits the right to sue on the remainder. Staples v. Goodrich, 21 Barb. 317; Calvin v. Corwin, 15 Wend.

557; Bendernagle v. Cocks, 19 Wend. 207; Fetter v. Beale, 1 Salk. 11; Farrington v. Payne, 15 Johns. 432; Waterbury v. Graham, 4 Sandf. 215; Stephens v. Lockwood, 13 Wend. 644; Nathans v. Hope, 77 N. Y. 420; Allen v. Saunders, 6 Neb. 436, 440; Beck v. Deveraux, 9 Neb. 109, 112; O'Beirne v. Lloyd, 43 N. Y. 248. And where a whole demand is sued on, and the court or jury only allow part of it, that not allowed becomes *res judicata*, and it is forever afterwards barred. Phillips v. Berick, 16 Johns. 136. The criterion by which it is determined whether a cause of action be entire and indivisible is to ascertain if it arise out of a single and entire contract, transaction or act. If this be true, the demand is an entirety; and if there be different and separate acts or contracts out of which the cause of action grows, each separa e contract will be, ordinarily, cause or ground for separate actions. Secor v. Sturgis, 16 N. Y. 548; Staples v. Goodrich, 21 Barb. 317. And this is true though all be due and might be sued on. For the plaintiff may have good reasons for not suing on all. He may feel secure in some, not in others. He might need part of what is due him and be willing to wait for other demands. Nathans v. Hope, 77 N. Y. 420. And when the causes of action are thus separate and arise out of different transactions, or are different entire contracts, though existing between the same parties, an adjudication upon one or some of them, will not bar an action on others not sued upon as is the case when all that is demandable arises out of an indivisible contract. Badger v. Titcomb, 15 Pick. (Mass.) 409. And a contract to do separate things at different times is divisible, and an action may be maintained separately for a failure to comply therewith or on the price to be paid upon the separate undertakings. Badger v. Titcomb, 15 Pick. (Mass.) 409. So, where money becomes due by contract in separate installments each installment becomes a separate cause of action, though these arise from a single contract, as, for instance, to pay rent monthly at a certain rate for a number of months, or to pay interest semi-annually on a loan running for a number of years. Allen v. Saunders, 6 Neb. 436, 441; Cooke v. Wharwood, 3 Saund. 337; Avery v. Fitch, 4 Conn. 362; Whitaker v. Hawley, 30 Kan. 317, 328, 1 Pac. Rep. 508. And a party having several separate causes of action against the same defendant cannot be compelled to join all the actions in one, but may insist on his right to sue separately on every one unless this be forbidden by statutory requirements. Phillips v. Berick, 16 Johns. 136; Beck v. Deveraux, 9 Neb. 109, 112. But where a party has several separate demands against the same person, and sues on them all in different actions, it would be the clear duty of the court to order a consolidation if the actions were such as could be consolidated in order to save cost and unnecessary litigation. An action for slander is an entirety, and only one suit can be maintained though there be a number of charges, all of which are slanderous. Cracroft v. Cochran, 16 Iowa, 301. Likewise, several breaches of the same contract constitute but a single cause of action. Commissioners of Barton Co. v. Plumb, 20 Kan. 147; Houston v. Delahay, 14 Kan. 125; Bond v. Weed Sewing Machine Co., 23 Kan. 119; Whitaker v. Hawley, 30 Kan. 317, 328, 1 Pac. Rep. 508. A complaint for the price of materials and for labor performed, all of which is under one contract states but one cause of action. Rahlring v. Huebschmann, 34 Wis. 185. So a running account with mutual debits and credits is but a single cause of action, though it embraces many separate transactions and extends through a long period of time. Memmer v. Carey, 30 Minn. 458. And, of course a single promissory note, all payable at one time, is an entire demand and only one action can be maintained thereon. Willard v. Sperry, 16 Johns. 121. Where a party conveyed an easement in the form of a right of way over certain realty covenanting to keep a gate on the way in good repair, it was held that an action for not keeping the gate in repair would not bar a subsequent action for the same omission if it should a second time be permitted to get in such a condition as would amount to another breach of covenant. Crain v. Beach, 2 Barb. 120; Beach v. Crain, 2 N. Y. 86. This is like the rule permitting successive recoveries on a single contract of rent for a number of months where by the requirements of the contract a certain amount of rent is to accrue and become payable for every month. A contract of insurance, where but one policy is issued and the property of but a single person is insured, is but a single contract, and the action cannot be split up into more than one suit, though by the terms of the policy, the loss, if any, is made payable to a third person, as mortgagee or security. In such cases, except perhaps in instances where the standard mortgage form is used the mortgagee must assert his rights through the assured. If the assured cannot recover, the mortgagee cannot, for there is but a single contract of insurance, and that is to protect the property of the assured, not the mortgagee. Such contracts are uniformly held to be entire and they must be sued on accordingly. Burlington Insurance Co. v. Lowery, 61 Ark. 108, 32 S. W. Rep. 383; Phenix Ins. Co. v. Public Parks Amusement Co. (Ark.), 37 S. W. Rep. 959; Hartford Insurance Co. v. Davenport, 37 Mich. 613; Carberry v. Insurance Co., 86 Wis. 323, 56 N. W. Rep. 920; Thatch v. Ins. Co., 11 Fed. Rep. 29. The rule is applied not only to causes of a civil nature, but in criminal cases as well. And where an offense is committed the continuous commission of which lasts through several days, the defendant cannot be convicted for every hour, minute or day which he violates the law. State v. Judge of Civil Dist. Court, 47 La. Ann. 701, 17 South. Rep. 288; State v. Whitaker, 48 La. Ann. 528, 19 South. Rep. 457. And in all cases where a court improperly attempts to take jurisdiction of causes split up in violation of these principles prohibition will lie to prevent it. State v. Whitaker, 48 La. Ann. 528, 19 South. Rep. 457.

W. C. RODGERS.

JETSAM AND FLOTSAM.

DEFEATING A TESTATOR'S WISHES.

It would be difficult to find in the books a more extraordinary example of the frustration by the courts of a testator's wishes than is furnished by the case of Edson v. Bartow, 41 N. Y. Supp. 723. This was an action brought by the next of kin to impose a trust on a bequest to the executors, and to declare that trust invalid. The terms of the bequest thus sought to be nullified were as follows: "If, for any reason any legacy · · · fail · · · I give and bequeath the amount which shall not take effect absolutely to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions; leaving the same to them absolutely, and without limitation or restriction." The

grounds advanced by the appellant for imposing the trust were that there was a secret understanding between testatrix and executors that the latter were to take, not beneficially, but subject to a legal obligation to carry out certain trusts expressly declared in previous sections of the will, and which in a former suit had been held void for indefiniteness. Fairchild v. Edson, 77 Hun, 298. If these trusts could be fastened on the apparently absolute bequest to the executors, they would of course be equally invalid in this form, and the next of kin would be let in. It must be admitted that the propositions of law necessary to support the appellant's position, while open to criticism in the point of principle (see an article on the Failure of the "Tilden Trust," 5 Harvard Law Review, 389), are sustained by the authorities. Russell v. Jackson, 10 Hare, 204; O'Hara v. Dudley, 95 N. Y. 403.

But did the facts of the case warrant the application of principles of questionable justice and expediency? In other words, what was the evidence of a secret undertaking on the part of the executors? They were three in number; one of them, Mr. Parsons, drew up the will, while the other two knew nothing of its contents until after the death of the testatrix. All were men of integrity, and anxious to fulfill what they believed to be a moral obligation. The court properly held that, as by statute the executors took as tenants incommon (*In re* Kimberly's Estate, 44 N. E. Rep. 945), the knowledge and act of one could not bind the others. Rowbotham v. Dunnett, 8 Ch. D. 430. Two then were held to take beneficially. The manner in which the court dealt with the case of Parsons is subject for wonderment. They were able to find an agreement between him and Miss Edson, that he should take the bequest subject to a legal obligation. This agreement they implied merely from the fact that Parsons knew the contents of the will. Solely because the executor was aware that Miss Edson wished to establish certain express trusts, if possible, the court said he was as legally bound by the terms of the absolute bequest as by the declared trusts. They laid stress on his acquiescence; what he acquiesced in they seem not to have considered. He agreed, it is true, to what the testatrix wished. But is it not clear that she declared her willingness to rely on the honor of her executors in the event of failure of the express trusts? Was it not a moral obligation, merely, that she intended to impose? Why was the absolute bequest added if the testatrix expected it to have the same effect as the bequests on trusts? In the light of a common sense reading of the will, it is difficult to understand how the court reached their conclusion, and the lamentable result of their reasoning makes its fallacy more apparent. Mr. Justice Ingraham, who dissented on the ground that the secret trust should bind all the executors, seems to be not without a sense of humor. He says, "It is a canon of construction universally applied, that the sole object of a court is to ascertain and enforce the intention of the testator."—*Harvard Law Review.*

ATTORNEYS' EMPLOYMENT AND THE STATUTE OF LIMITATIONS.

In Ennis v. Pullman Palace Car Co., 165 Ill. 164, interesting questions of law, affecting retainers of and services due to attorneys, were discussed by Chief Justice Magruder. After July 1, 1885, the hiring of Mr. Ennis was a hiring by the month, and hence it was held that the statute of limitations began to run against the right of action for each month's services on the first day of each succeeding month. But it was claimed by Ennis' counsel that this was a case of indefinite hiring, and that the statute did not begin to run until the termination of the whole services.

The court refused to concur in this view, and laid down the following propositions: (1) Where an attorney is conducting a single suit, the statute of limitations will not begin to run until the end of the suit or the termination of the retainer in some other mode. (2) Where attorneys are regularly employed at a salary, given for advice and legal superintendence, and other services rendered from day to day, they stand upon the same footing as other salaried employees, so far as the statute of limitation affects them. (3) Ordinarily, when a man is employed under a general agreement, fixing no term of service, but he continues in service a long time, his hiring will be treated as a hiring by the year. But in such a case the statute will ordinarily bar a claim for all outside of the five years immediately before the commencement of the action, unless there is evidence to take it out of the operation of the statute. (4) The rule of hiring without express contract where the service is continued for a long time, the hiring will be understood to be by the year, unless circumstances and the dealing of the parties indicate a less period of time.

In the case under consideration, the evidence was held to raise the implication that the term of employment was by the month, and that hence, the limitation statute began to run at the end of each month, thus barring that part of the "wages" which had accrued more than five years before the action was brought, although the same service was thereafter continued between the parties. The court practically likened professional services payable monthly to wages earned, due at fixed times, and permitted the statute to run from the date when due.

The corporation, through its officer, treated these payments in the nature of "salary," "settled monthly by payment and receipt," as seems to be the custom in corporations. It is questionable whether, under these circumstances, the ruling of the court was correct.

The case is much stronger in regard to the monthly vouchers, as indicating agreements of accord and satisfaction. The rule of law which permits such "vouchers" or receipts to be overthrown by evidence, by way of explanations, is also accompanied by the qualification that the explanatory proof be clear and unmistakable. This is a safe rule necessary for the conduct of business in its multiform phases, and it is this feature of the case which, without question, strangled the case of the attorney.—*National Corporation Reporter.*

MR. BEACH AND HIS PUBLISHER.

A somewhat interesting controversy has arisen between Charles F. Beach, Jr., the well-known author of legal text-books, and his American publishers, Messrs. Baker, Voorhis & Co., of New York. It appears that this firm is about to publish a second edition of one of Mr. Beach's best-known works, and that the editing of the same is not to be done by the author of the original work, because of a dispute as to compensation. Mr. Beach alleges that, after he had, in pursuance of contracts made with him by Baker, Voorhis & Co., collected a mass of matter for the second edition, and had done much other serious work upon the revision, the publishers refused to proceed with the work, "under what turned out to be an entirely mistaken notion that, by the operation, a few

dollars might be saved." He therefore feels called upon to notify intending or possible purchasers that the forthcoming new edition is no work of his, and that if it is advertised and brought out as a fair and honest equivalent for a genuine second edition of his original work, it will be a palpable fraud upon the public. Mr. Beach regards the action of the New York publishers as "penny-wise-and-pound-foolish," in view not only of the fact that they deprived themselves of the experience of and materials collected by the original author for the second edition, but were, in addition, compelled to pay more than $600 in settlement of his claims for damages for breach of contract with him. Of course, this feature of the matter possesses very little interest for the general public; but there is a nice ethical question involved. We refer to the right of a publisher to continue to attach to subsequent editions the name of the author of the original work, after he has, as in this case, denounced it as spurious and bastard. Aside from Mr. Beach's peppery references to the legal gentleman who is editing this second edition, and the alleged fact that he is doing the work for a mere pittance (which is his own, and not Mr. Beach's business), the latter makes the statement much more important, on information and belief, that the hard-working, though poorly-paid, editor has seen fit to incorporate and interpolate throughout the text "a quantity of agrarian and communistic nonsense in reference to corporations and combinations of capital for which I (he) would on no account consent to be held responsible," and which he thinks is little short of libelous to put out as his (Beach's) work.—*Albany Law Journal.*

CORRESPONDENCE.

LIABILITY OF CARRIER TO GRATUITOUS PASSENGER.

To the Editor of the Central Law Journal:

In vol. 44, No. 13 of the CENTRAL LAW JOURNAL, there is a letter signed by C. W. Watts, answering an article by Mr. Charles Hebberd on the subject of the Liability of Common Carriers to Passengers Carried Gratuitously, in which Mr. Watts gives, reasons of much weight why such carriers should be held answerable for damages resulting from their own negligence notwithstanding such passenger's agreement to the contrary. But it is not the purpose of this article to discuss the various decisions bearing upon this principle of law, but rather to call attention to a certain well known and common fact, suggested by the following questions propounded in the article referred to, to-wit: "Is it not a fact that a pass is but rarely given except where the carrier thinks he will derive some advantage by giving the pass, in the way of gaining business or influence or some other thing? Ought not this phase of the matter to be considered in deciding cases involving free passes?" The first of the above questions scarcely admits of but one reply, but as to the last we may be pardoned if, before answering, we stop to inquire whether the judge himself hasn't a pass in his pocket. For if he has, the ordinary litigant would prefer that the question be left in abeyance until such time as it could be brought before a court not so circumstanced. Why do railroads give passes to the judges of the various courts that have or may have jurisdiction over such roads? And why do judges accept such presents when they would undoubtedly reject other gifts of no greater value if offered by other litigants or prospective litigants, or by the same railroads? I am inclined to think that the most of the judges who have been in the habit of accepting such passes, have done so without giving the matter any serious attention. There is a disposition among railroads lawyers to criticise the verdicts of juries rendered in railroad cases, and frequently not without just cause. But so long as it is known that the railroads are giving passes to the judges and others in authority, the juries, true to human nature, will "lean to the side of the under dog."

Little Rock, Ark. W. J. TERRY.

BOOK REVIEWS.

TIFFANY'S PERSONS AND DOMESTIC RELATIONS.

In this book the same general plan has been followed as appears in previous volumesof the kind known as the Hornbook Series, that is, a concise statement of the law precedes each subdivision of the subject, and is followed and illustrated by a fuller treatment in the subsidiary text. The book is essentially for the student though it will be found of considerable usefulness by the practitioner. The importance of the subject, especially in view of the many modern statutory changes, gives its discussion and treatment a special value. It treats of the relative duties and responsibilities of husband and wife, parent and child, guardian and ward, infants, persons *non compus mentis* and aliens. The text bears evidence of thought and careful treatment, and there are many illustrative cases cited. It is a volume of nearly six hundred pages, published by West Publishing Co., St. Paul.

SCHOULER'S PERSONAL PROPERTY.

This is the third edition of a work well known to the profession, and the author of which has a well established reputation as a successful law book writer. His works on "Domestic Relations," "Bailments," "Executors," "Wills," rank among the standard law treatises. The high reputation of this writer, together with the already well known character of his works, would seem to render unnecessary any lengthy notice of the treatise before us. It is sufficient to say that in this edition the author has personally revised the entire work, making suitable references to the latest English and American cases on the various topics discussed. While the plan of the volumes remains essentially as before in describing the nature, general incidents and classification of personal property, it has gained in text about seventy pages over the second edition. The work is in two large volumes, beautifully printed and bound, and is published by Little, Brown & Co., Boston.

PERLEY'S MORTUARY LAW.

Those interested in a doleful and yet at times interesting subject will find in this volume of some two hundred pages on mortuary law all that he is liable to need on questions pertaining thereto. It treats of all manner of gruesome topics—last sickness, mutilation of dead bodies, property in, custody of and disposition of dead bodies, undertakers, funerals, monuments, cemeteries, etc. Published by Geo. B. Read, Boston.

JONES ON EVIDENCE.

Those interested in practical questions of evidence will find in these three small "pony" volumes an admirable collection of the law and authorities thereupon. It can certainly be said in their favor, that they furnish a convenient text book for trial lawyers, stating tersely the rules of law which govern in the trial of civil cases. The author is an eminent professor of law in the University of Wisconsin Law School, and in addition to recognized ability has, by reason of having for years lectured on the subject of Evidence, special qualification for a work of this kind. We have made careful examination and are pleased to state that the text is well written, bears evidence of care, diligence and discriminating thought, and the citations of cases are full and complete. The work is published by Bancroft-Whitney Co., San Francisco.

AMERICAN STATE REPORTS, VOL. 51.

In this volume will be found reported many important cases with useful annotations. Among them is Hanna v. Island Coal Co. (Ind.), with an exhaustive note on Lien of Attorneys; Jones v. City of Camden (S. Car.), with a note on Municipal Bonds in the Hands of Bona Fide Holders; Flanders v. Cobb (Me.), on the question as to what amendments to pleadings are not admissible because they change the cause of action; Leake v. Lacey (Ga.), on the subject of Garnishment of Municipalities. The series, American State Reports, are ably edited by A. C. Freeman, Esq., and published by Bancroft-Whitney Co., San Francisco.

BOOKS RECEIVED.

The Federal Courts. Their Organization, Jurisdiction and Procedure. Lectures Before the Richmond Law School, Richmond College, Virginia. By Charles H. Simonton, U. S. Circuit Judge. Richmond, Va.: B. F. Johnson Publishing Co. 1896.

HUMORS OF THE LAW.

Judge B—— fell down a flight of stairs, recording his passage in a bump on every stair, until he reached the bottom.

A bailiff ran to his assistance, and, raising him up, said:

"I hope your honor is not hurt?"

"No," said the judge sternly, "my honor is not hurt, but my head is."

"I judge, then," said the lawyer, "that your conjugal relations are not happy."

"Well," answered the client, "some of my conjugal relations don't care two straws how me and my wife gets along, and others of them, particularly my wife's mother, justs delights to see us quarrel. But I don't see as it's their business; and, you bet, if I make up my mind to separate from my wife, I ain't goin' to ask whether my conjugal relations is happy or not!"

In empaneling a jury for the trial of a cause in the Common Pleas Court before Judge L., Mr. O was asked by one of the counsel if he had any cause pending in court? He replied that he had one on a small claim before Squire McC., but there were no attorneys employed on either side. Judge Lincoln rather abruptly interrupted him by saying in a gruff manner, "You have no case pending in this court?"

"No, sir," said Mr. O, "it is in a court of justice."

Jones. What is a counselor at law?

Brown. An attorney of a couple of months' practice.

Jones. Well, what is an attorney?

Brown. A lawyer of a couple of years' practice.

Jones. What, then, is a lawyer?

Brown. Oh, a man who has been practicing law for a couple of generations.

Lawyer—"John!"

Clerk—"Yes, sir."

Lawyer—"Take this morning's paper, find the marriage list and send one of my cards to each of the persons whose name appears there, and be sure to underscore the words 'divorce business a specialty.'"

Mrs. Brown—Well, your husband's will is law.

Mrs. Jones—Oh, yes, it is; but it's like an excise law; it can't be enforced.

Judge—How did you come to steal this chicken?

Prisoner—Heredity, your Honor.

Judge—What do you mean, sir?

Prisoner—My ancestors landed on Plymouth Rock.

A Justice asks for Information.—Reading between the lines of the following letter, written by a justice of the peace, there is a whole unwritten library of reasons why the justice courts should be reformed:

"Mr. Atty General Dear Si you will please be kind a nuff to ansur a few words & questions of Law, for My benefit as I am a Justis of the Pease. 1st Have I got a wright if a man breeches the Pease or thretns to kill another man or offers a Duel in my presents can I Require him of a pease Bond without any further proof, or would I have to give him investigation."

In an action for breach of promise the fair plaintiff's attorney proposed to read to the jury the proposal of marriage, which happened to have been written on an ordinary telegraph blank. When he started to read he began with the words, "My dear Louisa." The counsel for defendant interrupted him and said, "If it please the court, this is an instrument partly printed, and partly in writing; by all the rules that were ever held by all the courts, if the party offers part of that instrument he must read it all, he can't read part of that and not read it all." The lady's attorney protested that the fact that the matter had been written on a telegraph blank was a mere accident only, and that the printed matter on the telegraph blank had nothing to do with the case; but the plaintiff's counsel insisted on having it read and was sustained by the court. Thereupon very reluctantly the gentleman began to read at the top of the message, "There is no liability on account of this message unless the same is repeated, and then only on condition that the claim is made within thirty days in writing." And then after the signature of "Yours lovingly, John," he was compelled still more reluctantly to read "N. B. Read carefully the conditions at the top."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATOR—Final Settlement.—In determining whether an administrator shall make final settlement, where there are claims outstanding against the estate, and it has realty undisposed of, the probate court has jurisdiction to decide whether the creditors have by laches lost the power to subject the property to their claims.—BROGAN v. BROGAN, Ark., 39 S. W. Rep. 58.

2. ADVERSE POSSESSION—Limitations.—Where a husband has been in possession of his wife's land for many years, and obtains a divorce, his possession after divorce, in the absence of any agreement, is adverse to the wife.—FERRING v. FLEISCHMAN, Tenn., 39 S. W. Rep. 19.

3. ALTERATION OF NOTE — Effect—Suretyship.—The insertion of the word "guardian" after the name of the payee will discharge a surety who had no knowledge thereof.—JACKSON v. COOPER, Ky., 39 S. W. Rep. 39.

4. ALTERATION OF NOTE—Evidence.—A promissory note altered in a material particular is rendered void, as to one who signs it as a surety merely, where such alteration was made without the knowledge or consent of such surety; and a mere verbal promise, without consideration, will not maintain an action against such surety for the amount of such note.—MULKEY v. LONG, Idaho, 47 Pac. Rep. 949.

5. APPEAL—Necessary Parties.—All the parties to a suit or proceeding who appear from the record to have an interest in an order, judgment, or decree challenged in appellate court must be given an opportunity to be heard there, before such court will proceed to a decision upon the merits of the case; and an appeal taken by one party only, without citation to or appearance by another party interested in the decree, will be dismissed.—DODSON v. FLETCHER, U. S. C. C. of App., Eighth Circuit, 78 Fed. Rep. 214.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS—Pledged Accounts.—Where an assignee receives accounts and notes which had been pledged by the assignor, collects part of them, and refuses to account to the pledgee for the accounts and notes or the amounts collected, the estate is liable to the pledgee for the conversion of the amounts collected, but not for the conversion of the accounts and notes.—ZIVLEY v. FIRST NAT. BANK OF LAMPASAS, Tex., 39 S. W. Rep. 219.

7. ATTACHMENT — Intervention. — Where in attachment a judgment is rendered for defendants, a judgment against a garnishee, in favor of plaintiff, is erroneous, whether the money garnished belonged to defendants or to an intervener.—LATHAM v. GREGORY, Colo., 47 Pac. Rep. 975.

8. BANKS AND BANKING — Equitable Assignment—Checks.—While the mere giving of a bank check or draft in the ordinary course of business does not operate as an equitable assignment of the fund, it is yet competent for the parties to create such an assignment by a clear agreement or understanding, oral or otherwise, in addition to the check, that such shall be the effect of the transaction.—FOURTH STREET NAT. BANK v. YARDLEY, U. S. S. C., 17 S. C. Rep. 439.

9. BANKS AND BANKING — Forged Checks — Expert Testimony.—Genuine checks and a forged check being in evidence, and submitted to the jury for inspection, expert witnesses may testify to the dissimilarity between the genuine and the forged signatures, to show the negligence of the plaintiff bank in paying defendant on the forged check the money to recover which the action was prosecuted.—IRON CITY NAT. BANK OF LLANO v. PEYTON, Tex., 39 S. W. Rep. 223.

10. BANKS AND BANKING—Officers.—A check was sent to defendant bank to indemnify it for furnishing a bond for plaintiff. The president and the cashier became sureties, and the check was deposited to their credit, and afterwards paid: Held, that the execution of a receipt by those officers individually did not constitute a contract between them, as individuals, and plaintiff, which extinguished the bank's liability to account for the check.—MERCHANTS' NAT. BANK OF FT. WORTH v. PHILLIP & WIGGS MACHINERY CO., Tex., 39 S. W. Rep. 217.

11. BOUNDARIES — Possession under Agreement.—While occupancy of an adjoining proprietor's land under a mistake as to the boundary line, and without any intention of claiming beyond the true line, is not adverse possession, yet an agreement between the proprietors, both being ignorant of the true line, fixing on a permanent line, followed by possession in accordance therewith, is binding on them and persons claiming under them.—ERNSTING v. GLEASON, Mo., 39 S. W. Rep. 70.

12. CARRIERS—Limiting Liability—Contracts.—It is the settled laws of this State that a common carrier cannot, by special agreement, relieve himself from responsibility for his own negligence, nor limit his liability for losses resulting therefrom.—PITTSBURGH, C., C. & ST. L. RY. CO. v. SHEPPARD, Ohio, 46 N. E. Rep. 61.

13. CARRIERS—Live Stock—Railroad Receivers.—Rev. St. § 4887, imposing a penalty for violation of the statute relating to the transportation of live stock upon "any company, owner or custodian of such animals," does not apply to receivers of a railroad appointed by a court to control and manage the road.—UNITED STATES v. HARRIS, U. S. D. C., E. D. (Penn.), 78 Fed. Rep. 290.

14. CARRIERS—Lost Shipment.—In an action against a carrier for goods lost in shipment, it appeared that the

consignor, in an action to which the carrier was not a party, had unsuccessfully sued the consignee for the price, claiming that title passed by delivery to the carrier. The consignor had an imperfect knowledge of the facts, the sale having been made by an agent: Held, that the consignor was not estopped from suing the carrier for the goods.—LOUISVILLE & N. R. CO. v. BERNHEIM, Ala., 21 South. Rep. 405.

15. CARRIERS—Passenger — Insult—Damages.—A woman who enters a railroad station with the intention of becoming a passenger may recover damages for mental suffering caused by abusive language addressed to her by the wife of the station agent, in his hearing, and without his interference.—TEXAS & P. RY. CO. v. JONES, Tex., 39 S. W. Rep. 124.

16. CARRIERS OF GOODS — Consignor's Ownership—Pleading.—In an action by a consignor against a common carrier for damages to freight, plaintiff's ownership of the freight must be alleged.—BUTLER v. PITTSBURGH, C., C. & ST. L. RY. CO., Ind., 46 N. E. Rep. 92.

17. CARRIERS OF PASSENGER — Contract—Packages.—A person entitled by the terms of his ticket to "personal passage" on a railroad car has not the right to carry with him packages of groceries for the use of his family.—DELAWARE, L. & W. R. CO. v. BULLOCK, N. J., 36 Atl. Rep. 773.

18. CHATTEL MORTGAGES—Release.—A chattel mortgagee of property exceeding the value of his debt cannot release a portion thereof for the debtor's benefit, and assert his lien thereon against a subsequent attaching creditor.—ANDREWS v. DUN, Tex., 39 S. W. Rep. 209.

19. CHATTEL MORTGAGE OF SHEEP.—A mortgage of sheep does not extend the lien thereof to wool thereafter growing on them, or lambs in gestation at its date. —FIRST NAT. BANK OF SANTA ANA v. ERRECA, Cal., 47 Pac. Rep. 926.

20. CONSTITUTIONAL LAW—Interstate Commerce—Police Power.—It is within the power of a State, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that State by stoves or furnaces kept inside the cars, or suspended therefrom (Laws N. Y. 1887, ch. 616), though such cars may be employed in interstate commerce. This power cannot be affected by possible inconvenience resulting from the adoption of conflicting regulations by adjoining States.—NEW YORK, N. H. & H. R. CO. v. PEOPLE OF THE STATE OF NEW YORK, U. S. S. C., 17 S. C. Rep. 418.

21. CONSTITUTIONAL LAW — Interstate Commerce—Privilege Tax.—Laws 1895 (2d Sess.), ch. 4, § 8, requiring all persons other than photographers of the State, who shall solicit pictures to be enlarged outside of the State, to pay a privilege tax of $25 in every county where so engaged, as applied to agents soliciting pictures to be enlarged in another State, is unconstitutional, as imposing a burden on interstate commerce. —STATE v. SCOTT, Tenn., 39 S. W. Rep. 1.

22. CONSTITUTIONAL LAW—Jury Trials.—A territorial statute providing that in trials at common law the court may require the jury, in addition to the general verdict, to answer special interrogatories, and, when there is a conflict between the two, may render such judgment as the answers require (Laws N. M. 1889, ch. 45), is not in conflict with the seventh amendment to the federal constitution, or the act of April 7, 1874, preserving the right of trial by jury in the territories. —WALKER v. NEW MEXICO, ETC. R. CO., U. S. S. C., 17 S. C. Rep. 421.

23. CONSTITUTIONAL LAW—Salary of County Officers. —St. § 1776, relating to the salaries of county officers, and providing that the judges of the county courts shall fix the salaries of the deputies or assistants employed by such officers, is not unconstitutional as a delegation of legislative power to a judicial tribunal.—STONE v. WILSON, Ky., 39 S. W. Rep. 49.

24. CONTRACT — Release.—One who renders services at another's request does not release his claim for compensation by stating to such other that he will leave it to him to say what the services are worth.— WHITING v. DUGAN, Tex., 39 S. W. Rep. 148.

25. CONTRACT—Sale or Agency.—A contract by which a manufacturer appointed a firm "special selling factors" to handle his goods, under which all goods consigned were to remain the property of the consignor until sold at prices fixed by the consignor, the consignees to protect the consignor from any decline in price, and to have the benefit of any advance, and which required the consignees to remit for all goods consigned at the end of 60 days, whether sold or not, or whether collected for or not, and did not require any report made as to sales, in so far as it affects the rights of third persons, is a contract of sale, and not of agency.—ARBUCKLE v. KIRKPATRICK, Tenn., 39 S. W. Rep. 3.

26. CONTRACT FOR FUTURE DELIVERY — Wager.—A contract for the future delivery of cotton is a wager, where it is not intended that the cotton shall be delivered, but one party is to pay the other the difference between the contract price and the market price at the date fixed for executing the contract.—CAMPBELL v. NEW ORLEANS NAT. BANK, Miss., 21 South. Rep. 400.

27. CONVERSION — Pleading.—In conversion against attaching creditors of plaintiff's vendor, where the complaint alleged that plaintiff was lawfully possessed of the goods, and the answer did not traverse such averment, defendants could not claim that the change of possession from the vendor to plaintiff was colorable merely.—GREENTHAL v. LINCOLN, Conn., 36 Atl. Rep. 813.

28. CORPORATIONS—Railroads—Operations by Lessee. —Const. art. 12, § 10, prohibiting any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from liabilities contracted in the operation of such franchise, does not give the employee of a corporation's lessee a right of action against the corporation for injuries through the wrongful acts of the lessee in the in the use of the leased property.—LEE v. SOUTHERN PAC. R. CO., Cal., 47 Pac. Rep. 982.

29. COVENANTS—Consideration.—Where an owner by recorded contract agrees to pay one-half the cost of a party-wall erected by the adjoining owner in case he builds so as to use the wall, and the amount is made a lien on his land, and he sells, without building, to one who uses the wall, the lien is enforceable as against the purchaser.—ARNOLD v. CHAMBERLAIN, Tex., 39 S. W. Rep. 201.

30. CREDITORS' SUIT—Corporations.—A general creditor of a corporation has no lien on its property, and cannot maintain a creditors' suit to set aside conveyances made by the corporation, and to subject the property conveyed to his debt or to the claims of its creditors generally, before the maturity of his debt, nor until he has reduced it to judgment and exhausted his legal remedy, unless he shows a state of facts which renders it impossible for him to proceed at law. —ATLAS NAT. BANK v. JOHN MORAN PACKING CO., Mo., 39 S. W. Rep. 71.

31. CRIMINAL EVIDENCE — Seduction — Age.—Prosecutrix in seduction can testify as to her own age, though her information may have been derived from her parents or other relatives.—STATE v. MARSHALL, Mo., 39 S. W. Rep. 63.

32. CRIMINAL LAW — Assault — Evidence.—Where plaintiff claimed that defendant made indecent proposals to her accompanied by an assault, it was relevant that she complained of the treatment at the first opportunity.—COLLINS v. WILSON, Ky., 39 S. W. Rep. 33.

33. CRIMINAL LAW—Homicide.—A charge that there must be a fixed design to kill, and that the premeditation "may take place but a moment before the doing

of the act, but both states of mind must have actual existence to make the offense murder in the first degree," is not objectionable, as providing for no appreciable space of time between the intent to kill and the act of killing.—STATE v. GIN PON, Wash., 47 Pac. Rep. 961.

34. CRIMINAL LAW—Homicide — Insanity.—In a murder case, where the defense is insanity, the burden of proving such defense is on the defendant, but he is not required to establish his defense beyond a reasonable doubt. In such case the vital question is, was the defendant, at the time of the homicide, capable of knowing right from wrong?—STATE v. LARKINS, Idaho, 47 Pac. Rep. 945.

35. CRIMINAL PRACTICE—Indictment—Sale of Lottery Tickets.—An indictment charging a sale of a ticket in the lottery known as the "Louisiana Lottery of the State of Louisiana" is sustained by a witness who describes it as a ticket in the Louisiana Lottery, though the ticket is not introduced in evidence, and defendant describes it as a ticket in the Louisiana "State" Lottery.—ANDERSON v. STATE, Tex., 39 S. W. Rep. 109.

36. DAMAGES—Exemplary Damages—False Return of Subpœna.—In an action against an officer for making a false return of service of a subpœna on plaintiff, thereby causing her arrest on a *capias*, where it appeared that the false return was caused by negligence, a charge which allowed exemplary damages without a finding that the negligence was gross or wanton was erroneous.—GIBNEY v. LEWIS, Conn., 36 Atl. Rep. 799.

37. DAMAGES FOR PERSONAL INJURY.—In an action for personal injuries which prevented plaintiff from working, his loss of earnings is a proper element of damages, and evidence of his average monthly earnings is admissible.—MURDOCK v. NEW YORK & B. DESPATCH EXP. CO., Mass., 46 N. E. Rep. 57.

38. DECEIT—Fraudulent Representations—Promises.—When a false promise about a material matter is made fraudulently and without an intention of keeping it, to influence another, and it does influence him, to part with his property, equity will afford relief, though the promise relates to an obligation to be performed in the future.—TOUCHSTONE v. STAGGS, Tex., 39 S. W. Rep. 189.

39. DEED—Life Estate.—A deed recited that the grantor conveyed to E certain lands, to have and to hold to "him and his forever;" that the grantor would forever warrant the said lands unto "E and his heirs;" and that, if E should die without children, the lands should revert to the grantor or his heirs: Held, that E took only a life estate.—WILSON v. WATKINS, S. Car., 26 S. E. Rep. 663.

40. DEED — Notice.—A recorded deed expressly retaining vendor's lien to secure the price, and reciting that, as additional security, a deed of trust has been executed, is notice to those claiming through it, not only of the lien, but of the unrecorded trust deed.—GARRETT v. PARKER, Tex., 39 S. W. Rep. 147.

41. DEED—Restrictions on Use of Land.—An express provision in the descriptive part alone of a recorded deed, that the building line shall be a specified distance from the street, is a perpetual restriction on the use of the land, binding on purchasers from the grantee whose deeds contain no reference thereto.—APPEAL OF TOWNSEND, Conn., 36 Atl. Rep. 815.

42. DEED, WHEN A MORTGAGE.—In an action to declare a deed absolute in form a mortgage, a judgment for defendant cannot be set aside where, in confirmation of the presumption of the deed, there was evidence from the conduct of the grantor, and from his pecuniary condition at the time of its execution, and his declarations before and after, that the deed was in fact absolute.—PERES v. CROCKER, Cal., 47 Pac. Rep. 928.

43. EJECTMENT—Title. — A grantee who took possession under a void deed may maintain ejectment against one subsequently taking possession under a valid deed from the same grantor, where such deed was offered and admitted in evidence merely as color of title, and there was no evidence of 10 years' adverse possession by defendant. — BRANCH v. SMITH, Ala., 21 South. Rep. 423.

44. ELECTIONS—Registration — Residence of Voter.—A man who has been away from his father's residence for four years, except for occasional visits, during two years of which time he has kept house and conducted business in another county, living all the time in the same place, and who intends to remain so long as his business is satisfactory, cannot register in the precinct in which his father resides, though he has always claimed it as his home, and voted there.—TURNER v. CROSBY, Md., 36 Atl. Rep. 769.

45. EMINENT DOMAIN — Condemnation of Railroad Property.—Under Act March 6, 1891, providing that the common councils of cities may condemn the right of way or other lands of railroad companies, whether occupied or not, for use as streets, a city could appropriate property used by a railroad to a second public use, though the same was inconsistent with the first use.—CITY OF TERRE HAUTE v. EVANSVILLE & T. H. R. Co., Ind., 46 N. E. Rep. 77.

46. EVIDENCE—Expert—Handwriting.—A person may be qualified to testify as an expert either by study without practice or by practice without study, but not by mere observation without either study or practice.—WHEELER & WILSON MANUFG. CO. v. BUCKHOUT, N. J., 36 Atl. Rep. 772.

47. EVIDENCE — Parol Evidence. — Parol evidence is admissible to identify "my life insurance policy amounting to $1,000," devised under a will. — HARTWIG v. SCHIEFER, Ind., 46 N. E. Rep. 75.

48. EVIDENCE — Parol Evidence. — Evidence of the situation of the parties, the subject-matter of the contract, and the circumstances under which it was entered into cannot authorize a construction which would make it conform to what the parties may have secretly intended, but failed to express, but only to explain the terms actually employed, if the language is of obscure or doubtful meaning.—STANDARD SEWING MACH. CO. v. LESLIE, U. S. C. C. of App., Seventh Circuit, 78 Fed. Rep. 325.

49. EVIDENCE — Parol Evidence. — Parol evidence is admissible to show a contemporaneous agreement at the time of the making of a note secured by mortgage that the security should first be exhausted before proceeding against the maker on the note. — CLINCH VALLEY COAL & IRON CO. v. WILLING, Penn., 36 Atl. Rep. 737.

50. FACTORS.—A factor who receives cattle consigned to him by the owner, with notice that the consignor has drawn on him in favor of a third person, who advanced the purchase price of the cattle, the waybills reciting that the consignment is for the latter's account, cannot apply the proceeds of the shipment on a debt due him from the consignor on drafts drawn against other shipments, which he has paid at the consignor's request. — EVANS-SNIDER-BUELL CO. v. FIRST NAT. BANK OF AMARILLO, Tex., 39 S. W. Rep. 218.

51. FEDERAL COURTS — Jurisdiction — Federal Questions.—The mere fact that, in the progress of the trial of a case, it may become necessary to construe the constitution or laws of the United States, does not give the federal courts jurisdiction of such case; but the decision must depend on such construction, and this must appear by the complainant's statement of his own claim, irrespective of what the contention of the defendant may be. — WISE v. NIXON, U. S. C. C., D. (Nev.), 78 Fed. Rep. 203.

52. FIXTURES—Engine for Mill.—Where one conducting his wife's milling business places on the property, at his own expense, a boiler and engine, with suitable connections for furnishing power when the water is low, they become part of the realty, and not trade fixtures, so that he cannot remove them either before or after foreclosure of mortgage on the mill.—ALBERT v. UHRICH, Penn., 36 Atl. Rep. 745.

53. FIXTURES — What Constitutes. — Counters, meat racks, and ice box used in a grocery business and meat shop do not pass to a purchaser of the real estate, where they are not mentioned in the deed, nor attached to the realty. — GRIFFIN v. JANSEN, Ky., 39 S. W. Rep. 43.

54. FRAUDS, STATUTE OF—Sale of Land. — Though the statute of frauds prevents specific performance of an oral contract for purchase of land, the purchaser, having in the suit therefor asked for general relief, may have enforced a lien for part payments made.—DEVORE v. DEVORE, Mo., 39 S. W. Rep. 68.

55. HOMESTEAD—Attachment Lien.—Where an attachment was levied on a house before the owner thereof had ever occupied it as a homestead, the lien of the levy was superior to any after-acquired homestead right. — BELL v. ANNISTON HARDWARE CO., Ala., 21 South. Rep. 414.

56. INJUNCTION — Adequate Remedy at Law. — A receiver may sue to enjoin collection of a judgment rendered against the corporation in a suit to which he was not a party; his remedy at law, by motion or *certiorari*, to vacate the judgment, being inadequate. —ROGERS v. HAINES, Ala., 21 South. Rep. 411.

57. INJUNCTION — Dissolution — Judgment. — When, upon a bill in equity filed as ancillary to an action of ejectment, a preliminary injunction has been granted restraining the defendant from cutting timber upon the land in controversy, for the purpose of preserving the *status quo* pending the litigation, and a verdict and judgment are afterwards rendered for the defendant in the action of ejectment, it is proper for the court, in the exercise of its discretion, upon being informed of such verdict and judgment, to dissolve the injunction.—KING v. BUSKIRK, U. S. C. C. of App., Fourth Circuit, 78 Fed. Rep. 233.

58. INSOLVENCY—Set-off — Sureties.—The surety on a note held by the trustee of an insolvent bank cannot have his deposit in the bank credited on the note where the maker is solvent. — NEW FARMERS' BANK'S TRUSTEE v. YOUNG, Ky., 39 S. W. Rep. 46.

59. INSURANCE — Breach of Condition. — A fire policy on household goods provided that it should be void if the hazard was increased by any means within insured's knowledge, or if fireworks were allowed on the premises: Held, that the condition was broken by the insured permitting fireworks to be placed in the house on July 3d, to be used the next day.—HERON v. PHOENIX MUT. FIRE INS. CO., Penn., 36 Atl. Rep. 740.

60. INSURANCE—Stock of Goods — Warranties. — Policies of insurance on a stock of goods consisted of a printed sheet containing the formal printed parts, and, attached thereto, a paper containing a description of the insured property, together with a "covenant and warranty" by the assured to keep, in a fireproof safe, or in some place not exposed to a fire which would destroy the building containing the goods, an inventory and account books containing a complete record of all business transacted: Held, that the covenant as to the keeping and method of preserving the inventory and books was a part of the policy, and constituted a warranty, the breach whereof prevented any recovery.—LOZANO v. PALATINE INS. CO., U. S. C. C. of App., Fifth Circuit, 78 Fed. Rep. 278.

61. INTOXICATING LIQUORS — Sales without the State. —It is no defense to an action for the price of liquors sold in a foreign State to defendant, a dealer in the State, that the license under which she carried on the business should have been issued to her as executrix, or to her business manager, rather than to her individually. — NEW YORK BREWERIES CORP. v. BAKER, Conn., 36 Atl. Rep. 785.

62. JUDGMENT — Pleading — Complaint — Answer — Waiver of Objections and Aider by Verdict.—A verdict and judgment will not cure a defective complaint, though the question is first raised on appeal, if the averment of an essential fact has been entirely omitted. — WESTERN ASSUR. CO. OF TORONTO v. KOONTZ, Ind., 46 N. E. Rep. 95.

63. LANDLORD AND TENANT—Damages from Defective Water Fixtures.—In the absence of a covenant to repair, a landlord who rents the upper story of a building containing water fixtures, which are in good condition at the time of the lease, and gives the tenant the exclusive possession and control thereof, is not liable to a tenant of the lower story for damages accruing during the lease by reason of an overflow caused by the defective condition of such water fixtures. — HAIZLIP v. ROSENBERG, Ark., 39 S. W. Rep. 60.

64. LANDLORD AND TENANT — Defective Premises.—A tenant cannot recover for injuries caused by the breaking of an entrance step used in common by the different tenants, unless the landlord knew that it was unsound, or could have known it by the use of reasonable care.—LYNCH v. SWAN, Mass., 46 N. E. Rep. 51.

65. LANDLORD AND TENANT—Lease — Rent.—A tenant is entitled to deduction in rent equal to the difference in rental value till a barn on the leased farm, burned after making of lease, but before time for tenant to take possession, is rebuilt; he having gone into possession on assurance of the landlord that he would have a roof for his crops before harvest time, and the landlord having then deprived him of use of part of the property for the purpose of rebuilding.—WAYNE v. LAPP, Penn., 36 Atl. Rep. 723.

66. LANDLORD AND TENANT—Repairs.—Where a lease provides for attorney's fees, if necessary to enforce the lease, the landlord cannot recover in an action for the rent, where the tenant recovers on a counterclaim an amount greater than the rent due.— —TAYLOR v. LEHMAN, Ind., 46 N. E. Rep. 84.

67. LANDLORD'S LIEN.—A landlord's lien on a crop, under Rev. St. 1895, art. 3237, providing that such lien shall be superior to all laws creating exemptions, is superior to the right of the children of the deceased tenant to an allowance in lieu of exempt property.— SHUMATE v. CHAMPION, Tex., 39 S. W. Rep. 128.

68. LANDLORD'S LIEN—Notice.—A purchaser of a tenant's cotton is chargeable with notice of a landlord's lien, if he have knowledge of facts sufficient to put him on inquiry.—FOXWORTH v. BROWN, Ala., 21 South. Rep. 413.

69. LIBEL.—A newspaper publication containing a statement which would be understood by those reading it, who knew plaintiff, to refer to him, and to imply that he was guilty of misappropriating public funds as an officer, is libelous *per se*.—FORKE v. HOMANN, Tex., 39 S. W. Rep. 210.

70. LIFE INSURANCE — Suicide—Insanity.—Provision in a life policy for non-liability if insured commit suicide, even when insane, is valid.—TRITSCHLER v. KEYSTONE MUT. BEN. ASSN., Penn., 36 Atl. Rep. 734.

71. MASTER AND SERVANT—Assumption of Risks.— Under the employers' liability act, an employee on a hand car, acting under the orders of a superior, does not assume the risks incident to the negligence of such superior in propelling the car.—WOODWARD IRON CO. v. ANDREWS, Ala., 21 South. Rep. 440.

72. MASTER AND SERVANT—Negligence—Knowledge of Dangers.—A servant injured by defective appliances is not necessarily guilty of contributory negligence by remaining in service after knowledge of the defects.— PARKER v. SOUTH CAROLINA & G. RY. CO., S. Car., 26 S. E. Rep. 669.

73. MECHANICS' LIENS—Claims.—A claim for mechanic's lien must show whether it is for original construction, or for addition, alteration, or repair; the liens therefor being materially different. — WHARTON v. REAL ESTATE INV. CO., Penn., 36 Atl. Rep. 725.

74. MECHANIC'S LIEN—Contract.—A contract entered into between a material man and the owner of land to furnish lumber for a house to be built on a lot in a certain town is sufficient between the parties to give a material man's liens, though, under Const. art. 16, § 37,

providing that material men shall have liens on buildings made or repaired by them, no particular lot was described in the contract.—POWERS LUMBER CO. v. WADE, Tex., 39 S. W. Rep. 158.

75. MECHANIC'S LIEN — Contract Covering Several Buildings.—An account for materials furnished under a general contract to furnish the bricks required in the erection of certain specified houses is a continuous one, and the seller may file a lien for any materials furnished under the contract at any time within six months from the last items furnished for the purpose named in such contract, though several months elapsed between such items and preceding ones.—MARYLAND BRICK CO. OF BALTIMORE CITY v. DUNKERLY, Md., 36 Atl. Rep. 761.

76. MORTGAGE—Conditional Payment.—A deposit by a widow of the amount due on a mortgage upon decedent's land with the mortgagee, and a surrender of the mortgage to her, on condition that the deposit shal be a payment only in case the estate is settled without suit, is not a payment except on the happening of the contingency.—BECKER v. CAREY, N. J., 36 Atl. Rep. 770.

77. MORTGAGES—Validity—Right to Foreclose.—Acts 1894, ch. 629, provides that no corporation shall act as agent in any loan on chattels, nor make any loan on chattels "or otherwise," except in its own name and for its own benefit; that any contract in violation of the statute is void, and that the act shall not apply to homestead and building and loan associations "incorporated under the laws of this State:" Held, to apply only to securities which bind chattels.—COMMERCIAL BUILDING & LOAN ASSN. v. MACKENZIE, Md., 36 Atl. Rep. 754.

78. MUNICIPAL CORPORATIONS — Defective Streets.—A municipal corporation is liable in damages to parties injured through its negligence in failing to keep its streets in proper repair, though no special statute authorizes an action for such cause.—CITY OF JACKSONVILLE v. SMITH, U. S. C. C. of App., Fifth Circuit, 78 Fed. Rep. 292.

79. MUNICIPAL CORPORATION — Defective Street Car Tracks.—Where a street railway company contracted with a city to keep the streets in repair, and a traveler was injured by defects in the track, the city was liable therefor, and was entitled to judgment over against the railway company.—FT. WORTH ST. RY. CO. v. ALLEN, Tex., 39 S. W. Rep. 125.

80. MUNICIPAL CORPORATIONS—Negligence.—In an action against a city for damages caused by the bursting of a defective water main, a charge that plaintiff must show that the defects were known to the city, or were "of such character as to have been readily ascertained on reasonable inspection," did not relieve the city from liability if it had caused a mere optical inspection, without practical tests.—FIDELITY & CASUALTY CO. v. CITY OF SEATTLE, Wash., 47 Pac. Rep. 963.

81. MUNICIPAL CORPORATION—Powers.—Under section 6 of article 8 of the constitution, a city is prohibited from raising money for, or loaning its credit to or in aid of, any company, corporation, or association; and thereby a city is prohibited from owning part of a property which is owned in part by another, so that the parts owned by both, when taken together, constitute but one property.—ALTER v. CITY OF CINCINNATI, Ohio, 46 N. E. Rep. 69.

82. MUNICIPAL CORPORATION—Street Railways—Damage to Franchise.—The franchise of a street railway company is subordinate to the right conferred on the city by its charter to control the streets, construct sewers, etc.; and the city may, in the honest exercise of its discretion, locate a sewer in the center of a street, so as to suspend the operation of a street railway, without paying compensation for consequent pecuniary loss to the company.—CITY OF SAN ANTONIO v. SAN ANTONIO ST. RY. CO., Tex., 39 S. W. Rep. 136.

83. NATIONAL BANKS—Torts of Officers.—As a national bank has no authority to loan the money of other persons, it is not liable for a loan made by its cashier for a depositor, even though the loan was made as the result of a conspiracy with the president with intent to defraud the depositor.—GROW v. COCKRILL, Ark., 39 S. W. Rep. 60.

84. NEGLIGENCE.—What action, if any, besides the preparation of a time-table, and rules to govern its use is required in a given case, in the discharge of the duty of a railroad company to devise a safe method by which to run its trains when off schedule time, is a question of fact, which cannot be reviewed on appeal.—SPRAGUE v. NEW YORK & N. E. R. CO., Conn., 36 Atl. Rep. 791.

85. NEGLIGENCE—Services of Wife.—The reasonable value of extra services rendered by a wife in nursing her husband, made necessary by an injury sustained by him through the negligence of another, is a proper element of damages recoverable by the husband in an action for such injury.—MISSOURI, K. & T. RY. CO. OF TEXAS v. HOLMAN, Tex., 39 S. W. Rep. 130.

86. NEGLIGENCE — Highways — Contributory Negligence.—It is contributory negligence for a horseman, apprised of an obstruction in the highway at the time his horse first took fright and turned back, to voluntarily ride up to the obstruction again. — TOWN OF SALEM v. WALKER, Ind., 46 N. E. Rep. 90.

88. NEGOTIABLE INSTRUMENT—Liability of Indorser.—An indorser is not relieved from liability by the fact that the indorsee gave him a receipt for the note "in settlement of account to date."—SMITH v. YOUMANS, S. Car., 26 S. E. Rep. 651.

88. NEGOTIABLE INSTRUMENT — Notes — Signature.—The liability of a business concern on a note, the proceeds of which it has received, is not affected by the fact that the manager has made himself personally liable by signing the note himself as manager, with the addition of the name of the concern.—FROELICH v. FROELICH TRADING CO., N. Car., 26 S. E. Rep. 647.

89. NEGOTIABLE NOTES—Bona Fide Holders—Notice.—The fact that a purchaser, for valuable consideration of negotiable notes, from a member of the payee firm, who claims to be the owner thereof, knows that the latter is the president of a bank whose indorsement in blank appears on the notes, after the indorsement of the firm, is not sufficient to put the purchaser on inquiry, or charge him with notice that the notes belong to the bank.—KAISER v. FIRST NAT. BANK OF BRANDON, U. S. C. C. of App., Fifth Circuit, 78 Fed. Rep. 291.

90. NOVATION.—An answer, by a partner, to a complaint on contract, which alleges that he had sold all his interest in the firm to the other partners; that they had agreed to carry out the contract, and released him from liability thereunder; that plaintiff had accepted the new firm as parties to the contract, and had received from them partial payments thereon,—shows a complete novation.—SCOTT v. HALLOCK, Wash., 47 Pac. Rep. 969.

91. OFFICERS — Sheriffs — Levy on Property.—Where an officer levies on, under execution, and sells, property which is not that of defendant in execution, he is not liable to plaintiff in execution if he surrenders the property levied on, and returns the proceeds to the purchaser at execution sale.—MCCARTHY v. O'MARE, Mont., 47 Pac. Rep. 953.

92. PARTNERSHIP—Action between Partners.—Where a partnership formed to continue the business of one of the partners gave such partner a check for a sum which he was supposed to have advanced on account of the business, and which it was understood would be repaid to the firm, the payment was a firm transaction.—COLE v. FOWLER, Conn., 36 Atl. Rep. 807.

93. PARTNERSHIP — Assignment for Creditors.—A statutory deed of assignment of partnership and individual property, executed by one partner alone, who signed his copartner's name, pursuant to mere verbal authority, did not pass realty owned by the non-executing partner individually, in view of Rev. St. 1895, art. 624, declaring that lands may be conveyed only by

instrument signed by the grantor, or by his agent thereunto authorized by writing.—JACKMAN v. FORTSON, Tex., 39 S. W. Rep. 219.

94. PARTNERSHIP—Dissolution—Retiring Partner.—A dissolution agreement contained an assignment by the retiring partner to the other of all his interest in the business, and provided that each partner was to pay one-half of the firm debts, and that the continuing partner should collect moneys due, and pay the retiring member one-half thereof: Held not an assignment by the retiring partner of his interest in commissions earned by the firm before dissolution.—RIGGEN v. INVESTMENT CO., Oreg., 47 Pac. Rep. 923.

95. PLEADING — Amendment.—The declaration was based upon a statute of Pennsylvania, and sought to recover damages for the death of plaintiff's intestate in that State, occasioned by defendant's negligence. Upon demurrer it was held bad, because it disclosed that plaintiff was the widow of deceased, and that by the law of Pennsylvania the action could not be maintained by a personal representative under such circumstances.—LOWER v. SEGAL, N. J., 36 Atl. Rep. 777.

96. PLEADING—Demurrer.—Where demurrers are erroneously sustained to counts in the complaint in an action for negligence, and plaintiff amends, and under the amendment obtains the benefit of all the proof he was entitled to under the original counts, and no additional burden is imposed on him, the error is harmless.—LAUGHRAN v. BREWER, Ala., 21 South. Rep. 415.

97. PLEDGE—Conversion.—In an action by a pledgor against a pledgee for the conversion of a pledge given in lieu of a bond to secure the performance of a contract a recovery will be defeated by proof that there was a breach of the contract, by which defendant sustained damages in an amount greater than the value of the pledge, and that he sold the pledge for its full value, and gave plaintiff credit for the proceeds.—REARDON v. PATTERSON, Mont., 47 Pac. Rep. 956.

98. PLEDGE OF SECURITIES—Wrongful Rehypothecation.—A pledged securities with B as collateral, and B wrongfully rehypothecated them, together with certain securities of his own, with C, to secure notes made by him to C. A, on learning thereof after B's insolvency, by taking up B's notes, acquired possession of all the securities, except a part of his own, which he left with C as indemnity against claims, suits, and expenses. Both loans being overdue, A sold B's securities, and applied the proceeds on B's notes: Held, that A had a perfect right to do this, and did not thereby give B's receiver any right or claim on the securities left in C's hands.—UNION PAC. RY. CO. v. SCHIFF, U. S. C. C., S. D. (N. Y.), 78 Fed. Rep. 216.

99. QUIETING TITLE — Complaint — Estoppel.—In an action to quiet title, an allegation that plaintiffs had paid for and gone into possession of the land and made improvements thereon under a parol contract, and that a deed had been made in which a vendor's lien, which did not exist, had been reserved, and that defendants were setting up a claim through the fraudulent lien, shows a cause of action.—SEAY v. FENNELL, Tex., 39 S. W. Rep. 181.

100. QUO WARRANTO—Another Proceeding Pending.—A *quo warranto* proceeding in the name of the State on the relation of a prosecuting attorney is not abated by the pendency of a former proceeding for the same relief in the name of the prosecuting attorney on the relation of private persons, which, under Rev. St. 1889, § 7900, could not be discontinued without the consent of the relators.—STATE v. MCSPADEN, Mo., 39 S. W. Rep. 81.

101. QUO WARRANTO — Jury Trial.—No right to trial by jury in a *quo warranto* proceeding is given by Declaration of Rights, art. 1, § 21, providing that the right to trial by jury shall remain inviolate; Code 1881, § 248, in force at the date of the adoption of the constitution, providing that either party "in an action at law," on an issue of fact should have a right to trial by jury.—STATE v. DOHERTY, Wash., 47 Pac. Rep. 958.

102. RAILROAD COMPANY — Contributory Negligence.—One who, immediately after a train has passed on one track, and while the air is filled with dust and smoke, crosses the track, and is struck by another train, is guilty of contributory negligence.—HOVENDEN v. PENNSYLVANIA R. CO., Penn., 36 Atl. Rep. 781.

103. RAILROAD COMPANY—Injuries at Railroad Crossing.—A complaint in an action against a railroad company for killing plaintiff's decedent at a railroad crossing, which alleges that defendant negligently allowed lumber to be piled on its right of way, obstructing the view of the track, but not alleging that decedent's view was thereby obstructed, and that the train was running at an unauthorized speed, and that no signals were given, without alleging that such acts of negligence were the cause of injury to the decedent, with an allegation that one of defendant's trains killed the said decedent, states no cause of action.—CHICAGO & E. R. CO. v. THOMAS, Ind., 46 N. E. Rep. 73.

104. RAILROAD COMPANY—Right of Way.—A deed of a right of way recited that the grantor reserved possession for two years of "all that portion lying south of said right of way, unless the grantee shall desire all or any portion thereof, except that portion occupied by said brickyard, for railroad purposes." The land included a clay bed: Held, that possession of part was conditioned on the grantee not taking it for railroad purposes, but that the land occupied by the brickyard was reserved absolutely for two years, with the right to dig the clay from the opened bed.—ELKHART & W. R. CO. v. WALDORF, Ind., 46 N. E. Rep. 88.

105. RELEASE — Partnership.—A written contract, whereby a partnership, formed on the retirement of one member and the taking in of a new member, agrees with the retiring member to assume the debts of the old firm, is, as between the parties thereto, an effective release of the retiring member's liability on such debts.—SANDERS v. BUSH, Tex., 39 S. W. Rep. 203.

106. REMOVAL OF CAUSES—Time of Removal—Stipulation.—Where a stipulation, signed by a party or his attorney or counsel, is of binding force, a cause may be removed from a State to a federal court within the period to which the defendant's time to answer is extended by a written stipulation, though no order of court is entered thereon.—CHIATOVICH v. HANCHETT, U. S. C. C., D. (Nev.), 78 Fed. Rep. 195.

107. REPLEVIN — General Denial.—In claim and delivery a general denial puts in issue plaintiff's ownership and right of possession, and also the wrongful detention by the defendant, and under such denial defendant may introduce evidence to establish any of the issues so raised.—PLANO MANUFG. CO. v. DALBY, N. Dak., 70 N. W. Rep. 277.

108. RES JUDICATA.—Where a judgment to foreclose the lien of an improvement certificate was affirmed on appeal, defendant landowner is estopped to enjoin the sale thereunder on the ground that the land is a homestead and such certificate is not a lien, where he failed to plead such defense in the original action.—O'CONNOR v. LUCIO, Tex., 39 S. W. Rep. 189.

109. SALE — Conditional Sale—Lien.—A stipulation in a note that title to the personal property for which it is given shall remain in the seller till payment is made, gives the latter a lien on the property, valid against purchasers with notice.—BALDWIN v. WARREN, Ky., 39 S. W. Rep. 25.

110. SALE—Damages—Measure.—Where a purchaser refuses to accept and pay for goods contracted for, the measure of the damages is the difference between the contract price and the market value of the goods at the time fixed for delivery.—BROWNING v. SIMONS, Ind., 46 N. E. Rep. 86.

111. SALE — Warranty.—The fact that a buyer paid part of the price did not preclude him from relief, in an action for the balance, on account of the worthlessness of part of the goods, where at the time of payment he had no knowledge of the defects.—BOWERS RUBBER CO. v. BLASDEL, Cal., 47 Pac. Rep. 931.

112. SALE OF STANDING TIMBER — Notice.—Defendant purchased standing timber after the recording of a deed to plaintiff of the land on which it stood, and pending a suit by plaintiff against defendant's vendor, which, as to notice of *lis pendens*, was governed by the law in force prior to the Code of 1892: Held, that defendant had constructive notice of plaintiff's claim, and the want of actual notice was immaterial. — ALLIANCE TRUST CO. v. NETTLETON HARDWOOD CO., Miss., 21 South. Rep. 396.

113. SALE UNDER EXECUTION — Validity. — A sale of lands made by the sheriff of G county, under a *venditioni exponas* issued to the sheriff of C county, is a nullity.—TERRY v. CUTLER, Tex., 39 S. W. Rep. 152.

114. SET-OFF. — Damages for trespass committed by plaintiff in ejectment on land of defendant contiguous to the premises in suit neither arise out of "the transaction set forth in the complaint" nor "upon contract," within Code Civ. Proc. § 438, and hence cannot be set off.—WIGMORE v. BUELL, Cal., 47 Pac. Rep. 926.

115. SUBROGATION .— One loaning money to pay off a deed of trust, on representations that it was the only lien on the land, and under an agreement that he should have a first lien thereon, is subrogated to the rights of the prior owners of the deed, as against one claiming a mechanic's lien for material furnished after the lien of the deed had attached, and with notice thereof.—WHITESELLE v. TEXAS LOAN AGENCY, Tex., 39 S. W. Rep. 194.

116. SUNDAY — Violating Sunday Law. — A complaint charging defendant with keeping open on Sunday a place in which certain sports known as "billiards" are carried on charges an offense, within Gen. St. § 3097, providing that every person who on Sunday shall keep open any place "in which any sports or games of chance are at any time carried on or allowed" shall be fined.—STATE v. MILLER, Conn., 36 Atl. Rep. 795.

117. TRADE-MARKS AND TRADE-NAMES—Infringement. —Defendants will be enjoined from branding whisky distilled by them "Waterfill & Frazier," though their firm is composed of persons named Waterfill and Frazier, where plaintiffs had a widespread reputation for whisky branded "Waterfill & Frazier" for 20 years before defendants commenced business, and defendants, after using the brand "J. M. Waterfill & Company," for some time, changed to "Waterfill & Frazier."—FRAZIER v. DOWLING, Ky., 39 S. W. Rep. 45.

118. TRUST—Evidence — Declarations. — The declarations of the grantor made after the conveyance are not admissible, as against the grantee, to show that the land was impressed with a trust, unless made in the presence of the grantee. — PHILLIPS v. SHERMAN, Tex., 39 S. W. Rep. 187.

119. TRUSTS—Execution — Presumptions.—A trust resulting from a "declaration of uses," reciting that declarant has invested another's money in land which he holds in trust for the latter, is not changed by a subsequent recital that the property is held for the beneficiary "for and until the payment" of all sums due him, "and the surplus, if any," for declarant's own use. —MILLER v. CRAMER, S. Car., 26 S. E. Rep. 657.

120. TRUST—Resulting Trust.—A resulting trust cannot be established by parol in favor of a grantor in lands conveyed by him by a warranty deed, not intended as a mortgage, in the absence of fraud or mistake; such a trust, to be valid, being required by the statute of frauds to be evidenced by writing.—ROGERS v. RAMEY, Mo., 39 S. W. Rep. 66.

121. VENDOR AND PURCHASER—Bona Fide Purchasers. —Where a vendor holds the naked title in trust for the vendee, a subsequent purchaser from the vendor, who either takes under a quitclaim deed or with notice of the equities, holds the title subject to the trust.—CLEMONS v. COX, Ala., 21 South. Rep. 426.

122. VENDOR AND PURCHASER — Sales — Forfeiture of Contract.—Where a contract to purchase land, and pay in installments, makes time essential, the vendor may cancel the contract for a default in a payment, and declare a forfeiture of the installments already paid.—HOLBROOK v. INVESTMENT CO., Oreg., 47 Pac. Rep. 99.

123. VENDOR AND PURCHASER — Defective Title. — An owner of land recorded a deed of trust for the benefit of his wife and daughter for life, and then to their heirs, with a power of sale in the wife and daughter. The grantee and trustee refused to accept the trust, and executed a deed of release to the original owner, in which the wife and daughter joined: Held, that the question whether a trust had been created in favor of the heirs of the wife and daughter was sufficiently doubtful, so that one contracting to purchase the land with a good and sufficient title would not be compelled to perform.—LORING v. WHITNEY, Mass., 46 N. E. Rep. 57.

124. VENDOR'S LIEN — Foreclosure. — An attachment lien established by a judgment, and ordered to be foreclosed, is not affected by foreclosure of a vendor's lien on the same land under a judgment in a subsequent suit, of which the attaching creditor had notice, but to which he was not a party. — MCDONALD v. MILLER, Tex., 39 S. W. Rep. 89.

125. VENDOR'S LIEN—Homestead.—Where a husband, representing the community, purchases and pays for property for a homestead, and converts it to that use, fictitious vendor's lien notes created by him, though without the wife's consent, at the time of the purchase, and recited in the deed as being such, are enforceable in favor of a *bona fide* holder.—NEW ENGLAND SAFE DEPOSIT & TRUST CO. v. HARRELL, Tex., 39 S. W. Rep. 142.

126. WATERS—Navigable Water—Accretion.—Where the channel of a navigable stream abruptly shifts from one side of an island to the other, the island owner acquires no title to the abandoned bed.—VOGELSMEIR v. PRENDERGAST, Mo., 39 S. W. Rep. 83.

127. WILLS — Absolute Bequest—Limitations Over.— After giving his daughter one-third of his estate, testator directed that the money part be paid to a trustee for her sole use, free from the control of any future husband, but that if she attained the age of 21 years, unmarried, her legacy should be paid to her directly, "to be held and used" by her until her marriage, and then settled on a trustee: Held, that the interposition of a trustee was merely for her protection in case of minority or coverture, and, as she was an unmarried *feme sole* when the will took effect, she acquired an absolute estate in the principal of the fund.—MEACHAM v. GRAHAM, Tenn., 39 S. W. Rep. 12.

128. WILLS—Construction—Nature of Estate.—Testator devised land to his son for life, and after death to the "heirs of his body, by him begotten," with remainder over if he should have no "heirs of his body, by him begotten, him surviving:" Held that, the modifying words to the term "heirs of his body" limiting that phrase to "children" the rule in Shelley's Case cannot be invoked to extend the devise to the son for life to a devise in fee simple.—GRANGER v. GRANGER, Ind., 46 N. E. Rep. 80.

129. WILLS—Nature of Estate—Life Tenant.—Testator gave all his estate to his wife, "for her sole use, benefit, and enjoyment during her life, with full power to sell and dispose of any of said property, and to use the proceeds thereof in such manner as she may desire," and directed his executors on her death to divide "such property as may then remain" among certain persons named. By a codicil he gave his wife $10,000 "for her sole use and benefit, with full power to dispose of the same, by will or otherwise:" Held, that the wife took a life estate only in the personal property with a power of disposal and appointment by act taking effect during her life for her own benefit.—ROBINSON v. SHOTWELL, N. J., 36 Atl. Rep. 780.

130. WITNESS—Impeachment.—Where the State, to discredit a witness, asked him if he was not under indictment for theft of cattle, the witness should be allowed to state on his re-examination that he was a *bona fide* purchaser of said cattle, and had not stolen them.—TIPPETT v. STATE, Tex., 39 S. W. Rep. 120.